STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,	)	
AT&T Communications of Illinois, Inc.,	)	
TCG Illinois, TCG Chicago, TCG St. Louis,	)	
CoreComm Illinois, Inc., WorldCom Inc.,	)	
McLeodUSA Telecommunications Services, Inc.,	)	
XO Illinois, Inc.,	)	
Northpoint Communications, Inc.,	)	
Rhythms NetConnection and Rhythms Links, Inc.,	)	
Sprint Communications L.P.,	)	
Focal Communications Corporation of Illinois, and	)	
Gabriel Communications of Illinois, Inc.	)	
	)	
	)	**01-0120**
Petition for Resolution of Disputed Issues	)	
Pursuant to Condition 30 of the	)	
SBC/Ameritech Merger Order	)	
	)	
	)	

COMMENTS AND BRIEF ON EXCEPTIONS

OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

SEAN R. BRADY
NORA A. NAUGHTON

April 11, 2002

Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C 800
Chicago, Illinois 60601
March 22, 2002
T: 312/ 793.2877
F: 312/ 793.1556

TABLE OF CONTENTS

The Staff of the Illinois Commerce Commission ("Staff"), by and through its attorneys, and, pursuant to 83 Ill. Admin. Code 200.830 and at the direction of the Administrative Law Judges ("ALJs"), submits its Comments on the Post Order Calculation performed by Ameritech, and its exceptions to the Proposed Order in this proceeding.

I. POST ORDER CALCULATIONS

A. Background

Subsequent to the filing of initial and reply briefs the Administrative Law Judges convened a status hearing on October 30, 2001 to resolve procedural matters. At that status hearing the parties agreed that Ameritech would perform calculations using the findings of the Proposed Order. Tr. 401-02. The purpose of the calculations was to determine whether the plan works in light of the determinations made by the ALJ's in the Proposed Order. *See* Tr. 409 (The Court (ALJ's) stating the purpose of performing the calculation over is to determine "whether the numbers work according to our plan."). The calculations were made on the actual aggregate data, that is already in the record, and that Ameritech was to serve each party their own data. Staff was to receive every party's data, as well as the aggregate data. Tr. 402. The parties agreed to admit the results of Ameritech's calculation into the record as a late filed exhibit, pursuant to 83 Ill. Adm. Code Part 200.875 – Post Record Data, and label the Exhibit ALJ Exhibit 2. Tr. 401-02.

The Proposed Order was issued on January 22, 2002. Ameritech performed the requested calculation and provided the results to the parties, for their review, on

February 12, 2002, and additional information on February 28, 2002 ("Post-Order Calculations").

B. Post-Order Calculations Ameritech Performed Accurately Reflect the Modified Ameritech Remedy Plan ordered in the Proposed Order

Staff has reviewed the spreadsheets and materials that Ameritech delivered on February 12th and 28th. From reviewing the spreadsheets provided by Ameritech on February 12, Staff believes that Ameritech correctly applied several of the ALJ recommended changes. Specifically, Staff reviewed: that the brightline test for benchmark measures was applied; that Ameritech preserved low, medium and high designations; and that Ameritech applied a critical value of 1.645 for parity measures.

On February 28th, Ameritech served a summary exhibit, identified as ALJ Exhibit 2, with a series of supportive schedules, which included their previously sent materials along with additional information as requested by the parties. ALJ Exhibit 2 illustrates the results of applying the Ameritech Remedy Plan that was modified in accordance with the January, 22 Proposed Order (Modified Ameritech Performance Remedy Plan) using the actual aggregate data from September through December 2000, for Tier 2 calculations, and October through December 2000, for Tier 1 calculations.[1]

Based on its review of the additional information served by Ameritech on February 28th, Staff believes that Ameritech has calculated penalty amounts for every instance of a performance "failure." That is, the calculations Ameritech provided the parties on February 28th reflects a penalty amount being assessed for every occurrence in which Ameritech failed to meet the appropriate performance measurement standard. These calculations used the Performance Remedy Plan ordered in the Proposed Order. After reviewing the Post Order calculations provided by Ameritech, Staff is satisfied that they have re-calculated the penalty amounts using information already submitted in the record of this docket, according to the instructions given by the ALJ.

A useful comparison of the effects of the Proposed Order is to compare what Ameritech would have paid using its own remedy plan in comparison to what it would pay under the Modified Ameritech Performance Remedy Plan. Table BOE-1 is a summary of ALJ Exhibit 2 that presents the remedy payments Ameritech would have to make based on the Modified Ameritech Performance Remedy Plan, as ordered in the Proposed Order.

Table BOE-1. Summary of Tier 1 and Tier 2 Payments using the Modified Ameritech Remedy Plan as ordered by the Proposed Order

Month			
October 2000	$ 2,508,300	n/a	$ 2,508,300
November 2000	$ 2,649,200	$ 3,621,900	$ 6,271,100
December 2000	$ 3,472,900	$ 4,509,900	$ 7,982,800
Totals:	$ 8,630,400	$ 8,131,800	$ 16,762,200

Source: ALJ Exhibit 2

Table BOE-2, below, presents the actual remedy amounts Ameritech paid, as reported by Ameritech pursuant to a Staff Data Request (*see, generally*, Patrick Cross Exhibit 6; Staff Exhibit 2.0 at 59-61 contains a description of the data requested). As Table BOE-2 shows, the actual amounts paid by Ameritech to its competitors and to the State for the period displayed were less than $3.5 million. A problem with the amounts

[1] ALJ Exhibit 2, Schedule 1, includes a list of the calculations and modifications performed by Ameritech on their actual aggregate data from September through December 2000, for Tier 2 calculations, and October through December 2000, for Tier 1 calculations.

in Table BOE-2, is that they do not account for all CLECS. In their Data Request response, Ameritech noted that not every CLEC purchasing services in those months were eligible to receive penalty credits in those months. Staff Ex. 2.0 at 59; Staff Cross Ex. 6, Ameritech Response #MKP16.

Table BOE-2. Summary of Tier 1 and Tier 2 Amounts actually paid			
Month			
October 2000	$ 379,000	(omitted for consistent presentation)	
November 2000	$ 447,948	$ 991,000	
December 2000	$ 395,357	$ 1,181,300	
Totals:	$ 1,222,305	$ 2,172,300	$ 3,394,605

Source: Staff Ex. 2.02, Tables 1 and 3 (re-formatted for consistent presentation; based on information provided by Ameritech and entered as Patrick Cross Exhibit 6)

In response to a Staff Data Request, (*see generally*, Patrick Cross Ex. 6) Ameritech re-calculated the remedy amounts it would have owed all carriers using only the performance results for September through December of 2000. Table BOE-3 illustrates the results of that data request; which would be the payments Ameritech would have made to all CLECs, and not some of the CLECs as Table BOE-2 represents. Table BOE-3 is a better baseline model of the Ameritech remedy plan than Table BOE-2 because Table BOE-3 includes all CLECs.

Table BOE-3. Summary of "Baseline" Tier 1 and Tier 2 Re-Calculations			
Month			
October 2000	$ 886,500	N/A	
November 2000	$ 1,119,175	$ 1,215,400	
December 2000	$ 1,396,400	$ 1,460,800	
Totals:	$ 3,402,075	$ 2,676,200	$ 6,078,275

Source: Staff Ex. 2.02, Tables 1 and 3 (re-formatted for consistent presentation; based on information provided by Ameritech and entered as Patrick Cross Exhibit 6)

Therefore, to properly determine the impact the Modified Performance Remedy Plan would have on the overall remedies paid by Ameritech, Staff recommends comparing the payments under the Modified Performance Remedy Plan in Table BOE-1 to Table BOE-3. Comparing Tables BOE-1 and BOE-3 shows that, pursuant to the Modified Performance Remedy Plan, Ameritech would have owed an additional $10 million in remedies to the CLECs and the state during those months if Ameritech had provided the same service levels during the final months of 2000.

II. EXCEPTIONS

The Staff generally considers the Proposed Order to be well reasoned and to correctly decide the contested issues in the proceeding. Accordingly, Staff takes exception to the findings in Sections I, VII, IX, XII, XIII, XIV, and XVII of the Proposed Order, and suggests corrections for a few clerical errors.

EXCEPTION 1 **<u>Section I</u>: The Burden of Proof**

The Proposed Order finds that Staff and the CLECs have the burden of proof in this proceeding, citing Paragraph 11 of Condition 30 of the Merger Order, which states that "The participant proposing the addition, deletion, or change retains the burden of proving that such additions, deletion or change should be adopted in Illinois." Proposed Order at 6, citing the *Merger Order* at 260. While the Proposed Order also finds that Staff and the CLECs met their burden of proof, Staff takes exception to the Commission's conclusion regarding who has the burden of proof for some very pragmatic reasons.

The first and foremost reason is that in reaching this conclusion, the Commission has found, under the Proposed Order, that Ameritech's Remedy Plan (a version of the Texas Remedy Plan) was implemented pursuant to the *Merger Order*. Proposed Order at 6 - 7. Staff points out that while it is certainly true that Ameritech's Remedy Plan was implemented as a result of the *Merger Order* Condition 30, it was not implemented fully in accordance with it. The *Merger Order* contemplated that the plan to be implemented ultimately would be the result of collaborative agreement not as a voluntary, but nevertheless unilateral, action on the part of Ameritech.

Staff's concern is that this finding has implications that reach far beyond this proceeding. In particular, this finding will impact both the Part 731 rulemaking which currently seeks to establish carrier to carrier wholesale service quality rules (including a remedy plan) and the 271 proceeding which will establish a remedy plan to prevent "backsliding." Staff argues that the Commission gave itself the leeway to impose on Ameritech the Remedy Plan developed in this docket (as opposed to the Texas

Remedy Plan) in the Part 731 proceeding (or even in this proceeding as addressed in Exception 4) and to recommend this docket's Remedy Plan to the FCC in the 271 proceedings. The Commission should maintain its flexibility to recommend this docket's Remedy Plan because it is the Remedy Plan that resulted after the Commission examined in great detail, and found to be deficient, the Texas Remedy Plan. Moreover, the Remedy Plan in this docket was developed in the most comprehensive way possible. The ALJs analyzed complex data and calculations in order to provide what is truly the first Commission approved Remedy Plan. These efforts should not be wasted.

Staff also argues that the Proposed Order makes this finding in order to conclude unnecessarily, and as Staff maintains, inappropriately, that Staff and the CLECs had the burden of proof in this proceeding. As a result, the Commission may unnecessarily limit its options, or at least hamper its efforts, to seek a more stringent plan in the Part 731 and 271 proceedings, if it desires to do so. Since it is not necessary from a pragmatic point of view to conclude that Staff and the CLECs had the burden of proof in this proceeding in light of the ALJs' finding that Staff and the CLECs in general met the burden of proof anyway, and since Staff also argues that it is not the correct conclusion from a legal point of view, Staff urges the Commission to consider the implications of making the finding that the Ameritech Remedy Plan was implemented pursuant to the *Merger Order*.

One of the reasons Staff is concerned with the finding that the Ameritech Plan was implemented pursuant to the *Merger Order* is that the Proposed Order could be interpreted to be some sort of acknowledgement by the Commission that the Ameritech Remedy Plan was "approved" by the Commission. While Staff does not agree that this interpretation would be proper, Staff is concerned that the Commission may be unnecessarily restricted by this interpretation. Furthermore, the Proposed Order could be easily clarified to eliminate the possibility of such an interpretation by including a statement that the existing Ameritech Remedy Plan was not approved by the Commission but was implemented by Ameritech as a stop-gap measure to be put in place temporarily until the litigation that arose out of the collaborative resolved the Remedy Plan issues.

While Staff requests that the Proposed Order be clarified as stated above, Staff continues to request, in addition, that the Proposed Order be modified to find that Ameritech bears the burden of proof. Staff disagrees with the Proposed Order's conclusion that the Staff and CLECs bear the burden of proof for two reasons. The first is the fact that Ameritech and the CLECs filed a joint petition in this proceeding. Since a petitioner has the burden of proof as a matter of law and Commission practice, Ameritech and the Joint CLECs, as joint petitioners, each have the burden of proof. See 83 Ill. Admin. Code § 200.570. Furthermore, the fact that Staff is not technically a "party" to any Commission proceeding lends further support to this conclusion since Staff generally does not have the burden of proof in any proceeding before the Commission as a non-party participant. Staff, has the rights of a party participant but is not itself a party. See 83 Ill. Admin. Code § 200.40 Definitions, which provides, in relevant part, that: "Staff witnesses are not parties but shall have the specific rights and duties enumerated in this Part."

The second reason the Proposed Order's conclusion is incorrect is that the proper interpretation of the Merger Order leads to the conclusion that the Texas plan, as adopted, was never directly addressed, let alone, “approved” by this Commission. Rather, Staff argues that this Commission directed collaborative participants to use the Texas Plan as a starting point, expressing its preference for many of the components of the Texas plan, without approving them, and further, leaving to the collaborative the task of developing remedies. Unfortunately, the collaborative process failed and Ameritech’s Plan was implemented in place of the agreed upon Remedy Plan envisioned by the *Merger Order*.

The Proposed Order relies upon the language in the *Merger Order* that places the burden of proof on the participant proposing the addition, deletion, or change to the performance measurements and remedies to prove that such additions, deletion or change should be adopted in Illinois. *Merger Order* at 260. The Proposed Order concludes that Staff and the CLECs have the burden of proof in this proceeding:

> Therefore, any party desiring a change or modification to the existing Remedy Plan has the burden of proving that there should be a change to the existing Remedy Plan, which is the *status quo,* and that party has the burden of proving that its proposed change or changes to the *status quo* should be adopted. In this case, those parties are the CLECs’ and Staff. The Commission concludes that the CLECs’ and Staff bore the burden of proof.
>
> Proposed Order at 6.

Staff would agree with the Proposed Order’s conclusion if the existing Remedy Plan had been implemented in accordance with the intent of the *Merger Order*. In that case, the Proposed Order’s premise that the existing Remedy Plan is the status quo for purposes of the *Merger Order* would be appropriate. Staff argues, however, that it is not appropriate to apply the provisions of the *Merger Order* that deal with additions and modifications to the Remedy Plan that was expected to be adopted in the collaborative as if the existing Remedy Plan was indeed adopted in that manner. The intent of the *Merger Order* was to place the burden of proof on a participant seeking a change to the Remedy Plan agreed to by the collaborative, not, as in this case, where the collaborative failed and each party sought to litigate its position. Staff also points out that the Merger Order should not be interpreted to be a Commission approval of the Ameritech plan. If the Commission had approved the Texas remedy plan then the Commission would not have directed the parties in the *Merger Order* to work collaboratively to develop remedies.

As Staff explained in its Reply Brief, pursuant to the Merger Order, the goal of the collaborative process was to establish performance measures and standards and a remedy plan to enforce them, *starting with the Texas plan as a foundation* and providing changes suitable to Illinois. *Merger Order*, Condition 30 at ¶3. Pursuant to the *Merger Order*, within ninety days after the Merger Closing Date, Ameritech was to ". . . work with Staff, CLECs and any other interested parties in a collaborative process to develop the initial performance measurements, standards/benchmarks, and remedies to be implemented in Illinois." (*Merger Order*, Condition 30 at ¶ 3). The collaborative, however, failed to do what this Commission intended it do with respect to remedies. The collaborative participants failed to agree to remedies and instead agreed to put the remedy plan into litigation before the Commission.

This proceeding is the Commission's resolution of the collaborative failure. As a result, the "changes, additions and deletions" to the existing performance plan referred to in the *Merger Order*, as properly construed, refers to changes to the remedy plan *after* it has been agreed to through the collaborative process or ordered pursuant to the ensuing litigation-- not the Texas plan in its original state, with the only changes being those unilaterally made by Ameritech. *Merger Order*, Condition 30 at ¶11. Any other construction would result in providing a substantial incentive for Ameritech to defeat the collaborative process. If the collaborative failed, the ensuing litigation would place the burden of proof on the other participants.

To the extent that Staff has not been clear as to why it addressed burden of persuasion issues in its briefs, Staff welcomes the opportunity in this Brief on Exception to clarify its position. Although Staff believes that each of the parties has the burden of proof, Staff also argues that, in any case, each party always has the burden of persuasion in proceedings where it seeks the adoption of its particular position.

Staff also notes that in this proceeding there may be certain information that can only be provided by Ameritech. With respect to such information, Staff argues that Ameritech would in that case bear the burden of proof even if it did not generally have the burden of proof. As Staff pointed out in its Initial Brief:

> Additionally, since Ameritech has specific knowledge of, and access to, the programming, functionality and development and other features of the Texas Remedy Plan, Ameritech retains the burden of proof with respect to such matters, including the specific operation of the Texas plan.
> Staff Initial Brief at 6.

The Proposed Order did not find this argument relevant stating that:

> The Commission also disagrees with Staff as to the relevancy of Illinois law regarding the presumption that arises when a party fails to produce relevant evidence under its control. This negative inference concerns how the evidence, or lack thereof, is treated at trial, not who has the burden of proof.
>
> Proposed Order at 7.

Staff disagrees that these line of cases do not concern a shifting of the burden of proof. *See e.g., Fuery v. Rego Co*., 71 Ill. App. 3d 739, 744; 390 N.E.2d 97, 101 (1st Dist. 1979) ("If evidence with respect to an issue is within the control of the adverse party, it is he who has the burden of proof on that issue.") Staff, however, does agree that this distinction is no longer relevant in this proceeding since Ameritech has cooperated with Staff both during the litigation and in the post-record analysis of the Proposed Order in providing to Staff the information that was directly in its control, namely "the programming, functionality and development and other features of the Texas Remedy Plan."

While Staff agrees that it is no longer relevant, Staff believes that it may have been relevant without this cooperation by Ameritech. If Ameritech prevailed on the burden of proof argument and if they had also refused to provide the information within their control, this argument would indeed have been very relevant. Without the data and remedy plan program, for example, Staff could not have proceeded with its case because it would not have been able to analyze the results of the Ameritech plan and the modified plan as proposed by Staff.

As a result, Staff urges that the Commission modify its language in the Proposed Order so as to avoid potential problems in the future. Since the issue is no longer relevant to this proceeding, Staff suggests that the entire discussion be deleted from the Commission's Analysis and Conclusions section. This is appropriate since it is not determinative of the issues and also since it will then not close out the opportunity for the Commission to consider this in the future when it is germane to the issues in the proceeding.

Staff requests that, even if the Commission elects not to change its conclusions in this proceeding, that Staff's Position be clarified to reflect the arguments made above and in its Initial and Reply Brief in this proceeding, as follows:

C. Staff's Position

Staff contends that each party to this matter has the burden of proof. (Staff Initial Brief at 5-7). Staff bases its contention on two points. The first is the fact that Ameritech and the CLECs filed a joint petition in this proceeding. From this fact, Staff concludes that, since a petitioner has the burden of proof as a matter of law and Commission practice, as joint petitioners, each party to this proceeding has the burden of proof. Staff also notes that it is not technically a "party" to any Commission proceeding. Staff, accordingly, believes that it generally does not have the burden of proof in any proceeding before the Commission as a non-party participant. Staff, has the rights of a party participant, but is not itself a party. See 83 Ill. Admin. Code § 200.40 Definitions, which provides, in relevant part, that: "Staff witnesses are not parties but shall have the specific rights and duties enumerated in this Part."

The second point is an interpretation of the Merger Order that that the Texas plan as adopted was never "approved" by this Commission. Rather, Staff argues that this Commission directed collaborative participants to use the Texas Plan as a starting point, expressing its preference for many of the components of the Texas plan, without approving them, and further, leaving to the collaborative the task of developing remedies. Staff notes that the collaborative process failed with respect to approving remedies and, as a result, the parties brought the remedy plan issues to the Commission for consideration in this proceeding. Staff maintains that the remedy plan that is approved pursuant to this proceeding will be the Commission "approved" plan. Staff also argues that, in any case, each party always has the burden of persuasion in proceedings where it seeks the adoption of its particular position. Staff also notes that in this proceeding there may be certain information that can only be provided by Ameritech. With respect to such information, Staff argues that Ameritech would in that case bear the burden of proof even if it did not generally have the burden of proof. In support, it cites case law setting forth two evidentiary principles: a.) that a party has the burden of persuading the trier of fact that its position is reasonable; and b.) when a party has control over evidence, a trier of fact is entitled to presume that failure to produce that evidence is due to the fact that the evidence would be damning to that party. (*Id.* at 6). Staff cites Illinois case law discussing the negative inference that arises when a party fails to produce relevant evidence under its control. Staff also cites the language cited by Ameritech in the *Merger Order* in support of its position that both parties have the burden of proof.

Staff also requests that the Commission Analysis and Conclusions be modified as hereinafter set forth:

D. Commission Analysis and Conclusions

We find merit in ~~At first blush,~~ Staff's contention, that each party bore the burden of proving that its proposed plan should be adopted~~, is attractive~~. ~~However, t~~The matter at bar is litigation pursuant to Condition 30 of the *Merger Order*, which provides, in pertinent part, that~~:~~ within ninety days after the Merger Closing Date, Ameritech was to ". . . work with Staff, CLECs and any other interested parties in a collaborative process to develop the initial performance measurements, standards/benchmarks, and remedies to be implemented in Illinois." (*Merger Order*, Condition 30 at ¶ 3).

The Merger Order also provides that "The participant proposing the addition, deletion, or change retains the burden of proving that such addition, deletion, or change should be adopted in Illinois." (*Merger Order* at 260).

The litigated issue in this proceeding arises from a failure of the collaborative process to develop the initial remedies to be implemented in Illinois. The collaborative participants brought the remedy plan to the Commission for resolution when the collaborative process failed. To interpret the Merger Order to place the burden of proof on the CLECs when the collaborative failed to reach an agreement on the remedy plan would have sabotaged the collaborative process that the Merger Order envisioned by giving Ameritech an incentive to be unreasonable in the collaborative in order to shift the burden of proof to the CLECs. This clearly was not our intention and is not a proper interpretation of the Merger Order. The Texas Plan was not approved by this Commission but was to be used to provide guidance as to the type of plan this Commission would look upon favorably. We never intended that the Texas plan be approved without change.

~~It was our intention that after the collaborative approved a remedy plan, using the Texas plan as a guide, that any party then~~Therefore, any party ~~desiring a change or modification to the existing Remedy Plan has the burden of proving that there should be a change to the~~ existing ~~Remedy Plan, approved by the collaborative.~~ which is the *status quo,* and that party has the burden of proving that its proposed change or changes to the *status quo* should be adopted. In this case, those parties are the CLECs' and Staff. ~~As a result, The Commission concludes that Ameritech~~ the CLECs' and Staff ~~bore the burden of proof.~~

The Commission <u>also</u> agrees with Staff that each party has the burden of *persuasion* that its position is reasonable. ~~But, t~~<u>T</u>he burden of proof is not the same as the burden of persuasion. Any party that appears in a legal proceeding has the burden of persuading the trier of fact that its position is reasonable. Such a burden is the burden of persuasion. (*Franciscan Sisters Health Care Corporation v. Dean*, 95 Ill. 2d 452, 456, 448 N.E.2d 872 (1st Dist. 1983)). The burden of proof requires that a party both persuade the trier of fact that its position is reasonable, and additionally it must prove each and every element of a case or defense. (*Id*.). Failure to prove each and every such element usually is fatal to that party's ability to gain relief, whereas failure to persuade, in and of itself, may not be fatal to a party's position. (*Id*.). <u>While we find that Ameritech has the burden of proof, we agree that, in any case, each party has the burden of persuasion that its position is reasonable.</u>

Here, a Remedy Plan is already in place pursuant to the *Merger Order* <u>but it is not the Remedy Plan developed through the collaborative process we established pursuant to the *Merger Order*</u>. Ameritech's Remedy Plan is the *status quo*, <u>but it is through default- a failure of the collaborative to achieve what we envisioned. This Commission did not approve the Texas Remedy Plan. Thus, only after the collaborative process approved a Remedy Plan or after we approved a Remedy Plan in a litigated proceeding, would it be required under the *Merger Order* for a party to prove the necessity of a change in the approved Remedy Plan.</u> ~~and, if a party to this proceeding did not establish that the *status quo* should be changed, the existing plan would remain in effect. Therefore, while Ameritech had the burden of *persuasion* as to its position, the CLECs and Staff had the burden of proving that the *status quo* should be changed, as well as proving that the changes they seek to implement are reasonable.~~

~~The Commission also disagrees with Staff as to the relevancy of Illinois law regarding the presumption that arises when a party fails to produce relevant evidence under its control. This negative inference concerns how the evidence, or lack thereof, is treated at trial, not who has the burden of proof. That inference arises, essentially, because evidence that should be before a trier of fact is not, in fact, before the tribunal, and that party has not produced an explanation as to why the evidence was not produced. (*See, e.g., Estate of Whittington v. Emdeko National Housewares*, 96 Ill. App. 3d 1007,1009-1010, 422 N.E.2d 26 (1st Dist. 1981)). Stated another way, the negative inference is punishment for withholding relevant evidence from a judge or jury. It does not concern who must prove anything. (*Id.*)~~

<u>Even though we have</u> ~~Having~~ determined <u>that Ameritech</u> ~~what parties~~ had the burden of proof, <u>had we determined that the CLECs and</u>

Staff had the burden of proof that the existing plan be changed, they would have met it. ~~it is now necessary to examine whether that burden was met. As previously mentioned, the CLECs and Staff had the burden of proving that the existing plan should be changed.~~ Indeed, t~~T~~his was amply established. For example, Karen Moore, the Manager for Performance Measures at AT&T, testified that Application of the K Table, a significant component of the current Performance Remedy Plan, to remedy payment for February through April 2001 reduced the remedy payment over 60% of the original amount. (Moore Direct, Testimony 22). The testimony of Rod Cox, Senior Manager of Performance and Compliance at McLeodUSA, established that Ameritech's record with McLeodUSA regarding timely repair of service outages was abysmal. (Cox Direct Testimony at 15). Dr. Melanie Patrick, a Staff witness, testified, essentially, that her review of Ameritech's performance led her to conclude that Ameritech consistently provides substandard service in some areas. (Patrick Direct Testimony at 59-62). Indeed, the CLECs and Staff presented abundant evidence establishing the need for many changes to the present system.

However, as is explained more fully below, in many instances, the CLECs did not satisfy their burden of persuasion to establish that their plan should be implemented. And, as also will be explained below, Staff did establish that most of the changes it recommended should be implemented.

EXCEPTION 2 Section VII: Duration of Plan Should Extend Beyond 2002

The length of the Remedy Plan is the single most important issue to be decided in this proceeding for if the Proposed Order remains intact, all of the work that went into analyzing the remedy data, statistical analysis and programming may be for nothing. Based upon an interpretation of the Merger Order, the Proposed Order concludes that "the Remedy Plan, as a condition to merger approval, expires in three years from the merger closing date, or October 2002". Proposed Order at 17. As it stands, estimating that the Commission will issue its order in this proceeding sometime in early June, the Commission approved remedy plan will be in effect for no more than approximately four months (until October, 2002). If the Commission grants an application for rehearing and a stay of this order, this order will have the dubious distinction of having expended the greatest amount of resources (the complexity of this proceeding having required an unusually high degree of attention from Staff and the Administrative Law Judges) for the least effect. This result is not only absurd, it is unconscionable.

No reasonable interpretation of the Merger Order can lead to this result. As the Proposed Order recognized (Proposed Order at 10), the Merger Order clearly sets forth its goals in establishing a remedy plan under Condition 30 as follows:

> We conclude that Joint Applicants' [SBC/Ameritech's] commitment to import to Illinois the "Texas plan" for performance measures and incident-based liquidated damages provisions is responsive to our question. But falls short of what we consider necessary to ***safeguard*** our ability to monitor a thriving and dynamic competitive telecommunications market for consumers. Our goal is to ensure that any conditions imposed in this Order are ***not illusory***, but rather are specific and enforceable, and that enforcement measures are adequate to ensure full compliance with the conditions.
>
> Merger Order at 220 (Emphasis added).

The most reasonable interpretation of the Merger Order is that it directed Ameritech to implement a remedy plan that would achieve these goals and that the plan would remain in place until these goals are achieved. That remedy plan was to based upon the framework of the Texas plan but was to depart from it in order to give the Commission the assurance that adequate, non illusory, safeguards were in place. Id. To argue that the Commission's preferred remedy plan was intended to be in place for only three years is not reasonable in light of these goals. Even more unreasonable is the argument that after directing the parties to work collaboratively to achieve these goals, the Commission intended that the Plan, as finally resolved through litigation, may never have been put into effect at all (or if put into effect, would be in place only for approximately four months).

A more reasonable interpretation of the Merger Order is that Remedy Plan that is adopted by the Commission in this proceeding is to remain in place at least until competition is an adequate safeguard for performance. See, Staff Reply Brief at 25, 27. Otherwise, it would be impossible for the Commission to achieve its goal of "safeguard[ing] our ability to monitor a thriving and dynamic competitive telecommunications market for consumers." Merger Order at 220. Since the Commission expressed the expectation that this safeguard (i.e., the Remedy Plan envisioned by the Commission) would be available to monitor a "thriving and dynamic competitive telecommunications market for consumers," the Commission clearly did not expect the safeguard to expire before a thriving and dynamic competitive market even existed.

Moreover, the Proposed Order is replete with certain ironies created by the finding that the Remedy Plan expires in October of 2002, indicating again that this could not possibly be the intention of the Merger Order. For instance, the Proposed Order has ruled that annual audits of data and processes are required. Proposed Order at 12. Unfortunately, the Plan will not last for one year so "annual audits" is more than just a little optimistic. Collaborative sessions are also ordered to determine performance measure weightings, with six-month reviews. Proposed Order at 42. Again, the collaborative probably will not be completed before the Remedy Plan expires; giving little incentive to the participants to attend. A six-month review would appear to be impossibility.

Furthermore, the Proposed Order apparently takes some comfort that a remedy plan may be voluntarily entered into by Ameritech in the context of the 271 proceeding.

Proposed Order at 17. The Commission should be hesitant to rely on 271 approval to maintain a remedy plan in Illinois for a number of reasons. The first and foremost reason is that the Commission's authority in a 271 proceeding is only to recommend or not recommend 271 approval. The Commission may not be able to impose on Ameritech the Remedy Plan that the Commission prefers to be in place. Second, the Commission should be wary of any voluntary agreement by Ameritech to impose the Texas Remedy Plan in a 271 proceeding. In the event 271 approval is not obtained, there would be no requirement that Ameritech continue to maintain even the Texas Remedy Plan in Illinois.

While it is certainly true that the introduction to all of the conditions established in the Merger Order sets forth a general statement of the expiration of those conditions (Merger Order at 237), this general language cannot be deemed to be applicable to Condition 30's implementation of an Illinois remedy plan, for several reasons.

First, Condition 30 provides a process whereby Ameritech was directed to implement initial performance measures/benchmarks and remedies, and to subsequently implement collaborative measures/benchmarks and remedies. Once this implementation is in place (which should have been completed by Ameritech within 3 years), the *expiration of the Condition* should not be interpreted to be an *expiration of the implementation of the Condition*. Certainly there is no support in the Merger Order for Ameritech's interpretation of this general language to mean that the implementation that Condition 30 sought to achieve must also expire along with the Condition. Moreover, the Merger Order is replete with references that indicate that the Commission understood Ameritech to be committing to implement in Illinois a plan that was to be based upon a remedy plan available in Texas to CLECs for an unlimited duration. Merger Order at 203-219.

Second, if there has been delay in the implementation of the Condition, that delay should be held against Ameritech since Ameritech was charged with implementing the Condition within the timeframes established by the Commission. Assuming *arguendo* that Ameritech's interpretation is correct and that the Commission did intend for the Remedy Plan (to be clear, the one that was to be adopted pursuant to the collaborative processes outlined in Condition 30) to expire within three years (or 3 years minus 300 days, which was the outside date for implementation of collaborative efforts), the Remedy Plan that is established pursuant to this proceeding should, at a minimum, be implemented for 2 years and 65 days (3 years minus 300 days). Thus, if the Commission does not agree with Staff's interpretation of the Merger Order, the alternative should not be the expiration of this Remedy Plan within 4 months but rather Ameritech should at least be required to implement it for the period of time it was intended to be in place under the Merger Order; i.e., 2 years and 65 days.

Moreover, Ameritech's interpretation of the Merger Order, as adopted by the Proposed Order, is particularly disturbing in light of the fact that the legislature has, in its recent enactment of PA 92-0022, mandated that the Commission establish carrier to carrier wholesale service quality rules and remedies. 220 ILCS 5/13-712(g). The Commission is currently undertaking, in Docket 01-0539 (Part 731), a rulemaking to establish such rules and associated remedies but a rule will not be in place until, at the earliest, March 2003. Therefore, a "gap" may occur that may last at least 6 months

(October, 2002- March, 2003) in which no wholesale performance measures or remedies affecting Ameritech will be in place in Illinois.

As an alternative to, or in conjunction with, an interpretation of the Merger Order that would extend the Remedy Plan beyond October, 2003, Staff recommends that the Commission exercise its authority under Section 13-712(g) of the PUA to provide that the Remedy Plan adopted in this proceeding be established as an interim, "stop-gap" measure until the Commission completes its rulemaking in Part 731. This interim measure would satisfy the legislature's mandate with respect to Ameritech and would be more in keeping with the intention of the Commission under the Merger Order. Moreover, since it was adopted pursuant to a full evidentiary hearing, as an interim measure, it is supportable. Further, a "stop-gap" remedy plan that is in compliance with the Commission's recommendations made in this proceeding is not only advisable but it is essential to achieve both the goals of the Merger Order and PA 92-0022. Staff also points out that the Commission has authority under Section 13-501(b) of the PUA to impose an interim tariff on a carrier after a hearing. 220 ILCS 5/13-501(b). Ameritech's remedy plan is currently tariffed and the Commission thus has the authority and opportunity to order Ameritech to maintain their existing tariff for a short period of time (e.g., 15 days) until Ameritech amends their tariff in compliance with the order issued in this proceeding.

To reiterate, after October, 2002, there will be no Ameritech remedy plan in Illinois unless one of several possibilities occurs. First, the Commission may adopt the Remedy Plan that comes out of this docket under the Alternative Regulation docket

(Docket 98-0252/0335 & 00-0764 consolidated). The Commission has clear authority to do so under Section 13-506.1 of the PUA.

Second, Ameritech may voluntarily agree to implement the Texas Plan (they will not agree to implement the Plan developed pursuant to this proceeding) to cover the gap period. Further, if, but only if, Ameritech obtains 271 approval, they will agree to implement the Texas Plan (again, they will not agree to implement the Plan developed pursuant to this proceeding) for some period of time to be determined in the 271 proceeding.

Third, the Commission may modify the Proposed Order in this proceeding based upon one of the alternatives proposed by Staff in this Brief. Namely, (i) the Commission may accept Staff's interpretation of the Merger Order to require that the Remedy Plan adopted in this proceeding be in place until the Commission can be certain that Ameritech is able to provide, and is providing, non-discriminatory service to CLECs; (ii) the Commission may accept Staff's alternative interpretation of the Merger Order to extend the Remedy Plan adopted in this proceeding for a minimum of two years and 65 days based upon the intended duration of the Plan reflected in the Merger Order; or (iii) the Commission may order Ameritech to establish, as an interim measure to cover the "gap" period discussed above, the Remedy Plan adopted in this proceeding under the authority granted in Section 13-712(g) and 13-501(b).

Finally, Staff believes that if the Remedy Plan adopted in this proceeding is allowed to expire in October of 2002, this result will be particularly egregious in light of Staff's efforts to bring this issue regarding the interpretation of the expiration provisions of the Merger Order to the attention of the Commission in the Alternative Regulation

Docket, a docket where the Commission would have had clear authority to impose the Commission's approved remedy plan on Ameritech.

As Staff explained in its Reply Brief in this proceeding, Staff raised the possibility that Condition 30 might expire in October, 2002, in the Alternative Regulation docket and sought to have the Commission extend the expiration date of the Remedy Plan, adopted in this proceeding, and incorporate it in the alternative regulation plan. Staff Reply Brief at 24-25. The Proposed Order in that docket (which has been subsequently amended to delete the language quoted in Staff's Reply Brief) took the position that Staff's concerns regarding the possible expiration of the Condition were unwarranted (and frankly against common sense) and further, directed the parties to address Remedy Plan issues in this proceeding.

Now in this proceeding, the parties have been told that Staff's concerns were *indeed* warranted. Unfortunately, the parties are also being told that the Commission has no authority *in this proceeding* to adopt Staff's request to extend the expiration date. Even more unfortunately, the record is closed in the alternative regulation docket and the order in that docket is scheduled to be issued the day this Brief on Exceptions is due. It is as if the parties have been directed to go down a road that turns out not only to be a dead end but a dead end that is subsequently blocked so that there is no turning back. This really works an injustice upon Staff, the parties and the Commission, as a whole. This injustice should (pardon the pun) be remedied.

C. Staff's Position

> Staff recommends that the Remedy Plan continue beyond the expiration of Condition 30 of the *Merger Order*. The wholesale performance measures, Staff argues, should be in effect until this Commission can be

certain that Ameritech is able to provide, and is providing, non-discriminatory service to CLECs. Staff witness, McClerren recommended that the Remedy Plan be in effect as long as Ameritech has an alternative regulation plan and as long as necessary for the Commission to ascertain if Ameritech is providing discriminatory service to CLECs. (Staff Ex. 1.00, McClerren Direct Testimony at 9).

Staff bases its recommendations upon an interpretation of the Merger Order. Staff posits that the most reasonable interpretation of the Merger Order is that it directed Ameritech to implement a remedy plan that would achieve the goals set out in the Merger Order and that the plan would remain in place until these goals are achieved. Otherwise, it would be impossible for the Commission to achieve its goal of "safeguard[ing] our ability to monitor a thriving and dynamic competitive telecommunications market for consumers." Merger Order at 220. That remedy plan was to based upon the framework of the Texas plan but was to depart from it in order to give the Commission the assurance that adequate, non illusory, safeguards were in place.

Staff acknowledges that it is certainly true that the introduction to all of the conditions sets forth a general statement of the expiration of those conditions (Merger Order at 237), Staff argues that this general language cannot be deemed to be applicable to Condition 30's implementation of an Illinois remedy plan, for several reasons.

First, Staff argues that Condition 30 provides a process whereby Ameritech was directed to implement initial performance measures/benchmarks and remedies, and to subsequently implement collaborative measures/benchmarks and remedies. Once this implementation is in place (which should have been completed by Ameritech within 3 years), the *expiration of the Condition* should not be interpreted to be an *expiration of the implementation of the Condition*. Moreover, Staff points out that the Merger Order is replete with references that indicate that the Commission understood Ameritech to be committing to implement in Illinois a plan that was to be based upon a remedy plan available in Texas to CLECs for an unlimited duration. Merger Order at 203-219.

Second, if there has been delay in the implementation of the Condition, Staff argues that the delay should be held against Ameritech since Ameritech was charged with implementing the Condition within the timeframes established by the Commission. As a result, Staff recommends that, if the Commission does not agree with Staff's interpretation of the Merger Order, the alternative should not be the expiration of this Remedy Plan within 4 months but rather Ameritech should at least be required to implement it for the period of time it was intended to be in place under the Merger Order; i.e., 2 years and 65 days.

D. COMMISSION ANALYSIS AND CONCLUSIONS

The *Merger Order* language states:

Except where other termination dates are specifically established, all conditions set out below shall cease to be effective and shall no longer be binding in any respect three years after the Merger Closing Date. (*Merger Order* at 237).

Condition 30 contains no other specifically established termination. The only conclusion that can be reached is that Condition 30, ~~and consequently the Remedy Plan,~~ expires in three years. <u>Although Condition 30 may expire in October of 2002, we agree with Staff that a proper interpretation of the Merger Order requires the Remedy Plan which was implemented pursuant to the procedures established in Condition 30 remains in effect until competition acts as regulator of service quality.</u>

In this proceeding, CLECs and Staff recommend that the Remedy Plan continue indefinitely. In the merger proceeding, Staff recommended, that "the Commission seek assurances from Joint Applicants that the plan will be an ongoing performance assurance program contained in interconnection agreements and not be subject to arbitrary termination at the discretion of Joint Applicants." (*Merger Order* at 214). Notably, the Commission did not adopt Staff's recommendation to make the plan ongoing. (*See*, *Merger Order* at 220-221). <u>This failure, however, in and of itself, should not be construed as a rejection by this Commission of Staff's position. Moreover, the Merger Order does not in any way support such a reading. In fact, taken as a whole, a more reasonable interpretation of the Merger Order indicates an assumption that Ameritech was committing to implement the Remedy Plan in Illinois on an ongoing basis.</u>

~~Additionally, no party has given us a legal basis for extending the deadlines included in the *Merger Order*. We are therefore left with the conclusion that the Remedy Plan, as a condition to merger approval, expires in three years from the merger closing date, or October 2002.~~

We note, however, that Ameritech's quest for Section 271 approval has begun and, in its Initial Brief in this docket, it stated that in the Section 271 proceeding it "will present its performance assurance plan to the Commission, and its proposal for continuing that plan beyond the termination date of Condition 30, and the Commission can review the plan as part of its overall assessment of compliance with the competitive checklist of section 271." (Ameritech Initial Brief at 67). <u>While Ameritech has committed to voluntarily implement the Texas Remedy Plan in order</u>

to obtain 271 approval, Ameritech has made no commitment, however, to implement the Remedy Plan as ordered in this proceeding. This Commission regards any attempt by Ameritech to impose its Texas plan, in lieu of the Commission approved Illinois plan adopted in this docket, with disfavor.

Further, in Docket 01-0662, the Commission indicated that it would fully investigate the remedy plan to ensure that the local market remains open to competition and "to guard against backsliding following 271 approval." (Order Initiating Investigation, Docket 01-0662, October 24, 2001, at 3). The Commission recognizes, however, that the backsliding standards used for recommendation under 271 approval have varied in stringency and, therefore, the 271 proceedings may not achieve the goals of the Commission in this proceeding. ~~The Commission, therefore, declines, at least in this proceeding, to extend Condition 30 beyond the expiration date provided for in the *Merger Order*~~.

EXCEPTION 3 Section IX: Parity Without a Floor Undermines the Commission's Standards Adopted Set in Part 730

The Proposed Order declined to implement a parity with a floor standard. Proposed Order at 24. Staff takes exception to the Proposed Order's findings and holding since it allows Ameritech to undermine the expressed intent of Section 13-712(a) and to operate in a manner that results in consumers receiving service at levels that are less than the minimum level of adequate service ("MLOS") set forth in 83 Illinois Administrative Code Part 730. Further, in the *Merger Order,* when the Commission ordered that performance measures be based on a parity standard, the Commission never intended that Ameritech could then provide wholesale service to CLECs at a level below the minimum levels of service required in Part 730. Finally, allowing Ameritech to operate in such a way provides a confusing and unnecessary difference between the level of service Ameritech provides retail customers, as opposed to wholesale customers.

The Proposed Order rejected Staff's proposal for a number of reasons. To summarize -- the Proposed Order found that Part 730 should not be used as a floor since it is limited to retail service (Proposed Order at 24) that it is unclear how Part 730 would be applied as a floor (*id.* at 25) that parity with a floor contradicts the *Merger Order's* clear directive on the application of parity measures *(id.* at 25) and that the FCC and federal courts have held that parity is all that is required (*id.* at 26).

The Proposed Order states that Section 730.100 prohibits Part 730 from being applied as a floor for wholesale performance measures, and limits the Rules service quality standards to retail service. Proposed Order at 25. Part 730. 100 states:

> This Part shall apply to the relationship between a serving local exchange carrier and its end user customer only. This Part shall not be applicable to the relationship between a serving local exchange carrier subject to this Part and any local exchange carrier that provides facilities or services to the serving local exchange carrier for provision to its end user customers.
>
> 83 Ill. Admin. Code 730.100.

Staff points out that while Part 730 does indeed apply to the relationship between a carrier and end user, that fact does not preclude certain of its standards from being used as a floor to the Remedy Plan. Staff is not proposing that the entire Part 730 be added to the remedy plan. Staff proposes that only the performance measures that have comparable Part 730 standards, incorporate as a floor the MLOS that is equivalent to that standard. This is necessary so that Ameritech does not provide its wholesale services at a level below what Ameritech should be providing under Part 730 to its retail customers. To accomplish this, Staff proposes that parity with a floor be used.

The Proposed Order also objects to incorporating the parity with a floor concept on the grounds that the parties must "follow the very clear directive pertaining to this issue contained in the *Merger Order*, which states:

> all performance measures must be based on comparison to performance that the Joint Applicants[2] provide to their own operations and/or subsidiaries. The burden of proof shall remain on the Joint Applicants to demonstrate that no retail analogs exist and that benchmarks should be substituted. (*Merger Order* at 221).

Proposed Order at 26.

While the Commission did indeed direct Ameritech to use parity performance measures where feasible in establishing performance measures subject to the Remedy Plan, this preference does not necessarily limit performance measure standards to either a parity standard or a benchmark standard, nor does it exclude the imposition of additional standards, such as a floor. The only limitation this provision imposes, is in a situation when the Joint Applicants do not want to use a parity standard, but want to use a benchmark standard in its place.

Additionally, interpreting the above provision as prohibiting a performance measure from having a floor or MLOS is not in the best interest of the consumers, for the reasons discussed above regarding the anticompetitive effect of parity only measures. The *Merger Order* expresses a preference for parity over benchmarks but the a more appropriate interpretation of the Merger Order would permit the Commission to incorporate its own established minimum additional standards to be imposed. It is not reasonable to assume, as any such narrow interpretation of the *Merger Order* would, that the Commission in expressing a preference for parity over benchmarks, intended this preference to undermine state regulatory minimum standards. Nor is it reasonable to assume that the Commission intended to ignore its additional duties under Section 13-712(a) and 220 ILCS 5/8-301, which require the Commission to ensure that all Illinois consumers shall receive a minimum level of adequate service. To accomplish this duty, a MLOS needs to be set for those wholesale measures that have comparable standards in Part 730.500 et seq.,. To not set a MLOS for wholesale measures, allows Ameritech to provide its wholesale services at a level below what Ameritech provides to its retail customers without subjecting itself to remedy payments.

The Proposed Order states that "we cannot adopt any proposal that Staff recognizes might encourage an ILEC to distinguish between the service quality provided to its retail customers and the service quality provided to its wholesale customers." Proposed Order at 27. The situation that the Proposed Order expresses concern over would only occur if Ameritech's performance falls below the minimum levels of adequate service set forth in Part 730. Ameritech, as an ILEC or retail provider, is to provide a level of adequate service to Illinois consumers based on Part 730. However, as a retail provider, if Ameritech fails to meet the standards of Part 730, and if its service is equally as bad to wholesale resellers, Ameritech would only be penalized for failing as a retail provider. This loophole occurs because Ameritech would be in compliance with the Performance Remedy Plan's requirement that wholesale providers provide parity service. Furthermore, McLeod witness Rod Cox's direct testimony describes the impacts on the CLEC community of an ILEC providing bad service to both a CLEC and

---

[2] SBC Communications Inc., SBC Delaware Inc., Ameritech Corporation, Illinois Bell Telephone Company d/b/a Ameritech Illinois and Ameritech Illinois Metro, Inc.,. *Merger Order*, at 1.

itself is more damaging to a CLEC than the ILEC. *See* McLeod witness Rod Cox Direct Testimony at 7-12.

Staff takes exception to the Proposed Order's reliance on FCC 271 findings, and federal court rulings. The Proposed Order quotes a provision from the Kansas Oklahoma 271 Order as the nondiscrimination standard Regional Bell operating Company's are to provide competing carriers. *See* Proposed Order at 26. The findings of the FCC in a Section 271 proceeding may be informative, however from the context in which it is used it is unclear how relevant it is. Furthermore, this proceeding is pursuant to state law, and as such, unless state law is inconsistent with the Telecommunications Act of 1996 ("TA96") or FCC regulations, states are free to impose their own requirements that foster competition. Section 261(c) of TA96 expressly preserves states' ability to impose such additional requirements:

> Additional State Requirements - Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the [Federal Communications] Commission's regulations to implement this part.
>
> 47 CFR §261(c).

The federal rule above enables Illinois to impose requirements or state laws that further competition and are not inconsistent with federal law. Given this, the Commission can establish a MLOS for performance measures that protect the minimum level of basic local exchange service set forth in Part 730. Even if the FCC's comments on parity are relevant, setting a MLOS does not contradict the FCC's findings the Proposed Order relies upon. *See* Proposed Order at 26 (restating the FCCs finding in the

Kansas/Oklahoma 271 Order). Furthermore, this is not a 271 proceeding, there is a separate Illinois proceeding (Docket No. 01-0662) addressing remedy plan compliance with the federal requirements related to Section 271. Therefore, the FCCs findings in a 271 proceeding are not directly applicable to the instant case.

The Proposed Order cites the Eighth Circuit's decision in *Iowa Utilities Board et al. v. FCC*, 219 F.3d 744, 757 (8th Circuit, 1999) as support for its finding that "the federal courts have consistently held that parity, and only parity, is required." Proposed Order at 26. As Staff argued in its Reply Brief, applying the Eight Circuit decision in this context is an improper expansion of the court's holding. Staff Reply Brief at 18-20.

The *Iowa Utilities Board* decision is distinguishable from this proceeding since the Supreme Court and Eighth Circuit decisions were narrowly tailored to §51.305(a)(4). Ameritech and the Proposed Order inappropriately broaden its application to this proceeding. The issue in *Iowa Utilities Board* was whether §51.305(a)(4) went beyond the scope of its enabling statute (the Telecommunications Act of 1996). *See*, *Iowa Utilities Board et al. v. FCC*, 120 F.3d 753, 812-13 (8th Circuit, 1997). *Iowa Utilities Board* did not preclude a state regulation from going beyond the provisions of TA 96. Additional state obligations may require superior service than the level of service the ILECs provide themselves. The Proposed Order must be modified to make this distinction. Otherwise, the rights of this Commission to impose additional state obligations would be severely limited in a manner contrary to what is permitted under TA96.

In *Iowa Utilities Board*, Section 51.305(a)(4) (the FCC rule promulgated under TA96) allowed a telecommunications carrier to request interconnection, and access to unbundled network elements, “at levels of quality that are superior to those levels at which the ILECs provide these services to themselves, if requested to do so by competing carriers.” *Id*. at 812. The Eighth Circuit’s holding was limited to a finding that the §51.305(a)(4), which requires “superior service”, surpasses the federal statute’s requirement of service “at least equal in quality.” The court did not state that its decision applied to parity in all situations, or that all superior quality rules are forbidden. The decision was limited to the appropriateness of the scope of the federal rule promulgated under its enabling statute with respect to requests for interconnection agreements. This proceeding is completely unrelated, and distinguishable from the provision the federal courts struck down. This is not an interconnection agreement, nor a request by a telecommunications carrier, this is a remedy plan ordered pursuant to state law (220 ILCS 5/7-204). Moreover, this is not a rulemaking that may be imposing more stringent standards than authorized under the state enabling statute. Therefore, the *Iowa Utilities Board* decision is irrelevant to this decision in this proceeding.

Furthermore, it would be inappropriate to expand the findings of the Eighth Circuit as is done in the Proposed Order, because that interpretation essentially removes all authority from states to set standards that are more stringent than what are required under federal law. This is a clear misapplication of the holding in *Iowa Utilities Board* since §261(c) allows states to impose additional state requirements necessary to further competition or to protect our current intrastate service. Therefore, the Commission can set standards that are stricter than federal law; states just cannot set standards that are less than or are contradictory to federal law. 47 USC §261(c).

In addition, Staff's proposal only accomplishes state law under §13-712, which is not in conflict with federal law. A state has the authority to ensure that its consumers receive the minimum level of telecommunications service. *See* 47 USC §261(c).

On page 27, the Proposed Order argues that "[I]f Ameritech is subjected to high penalties in this case . . . [i]n response, Ameritech may develop OSS systems that distinguish between Ameritech and CLECs. Currently many of these systems are automated and cannot distinguish between users." This entire paragraph seems unrelated to the issue at point, and is unsupported by the evidence in this case. 220 ILCS 5/10-103. Thus this paragraph should be stricken.

Section 13-712(a) states that "it is the intent of the General Assembly that every telecommunications carrier meet minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers." Therefore, an Illinois customer has the reasonable expectation of receiving minimum service quality standards regardless of the provider. Moreover, this Commission is charged with ensuring adequate service quality in the telecommunications arena. 220 ILCS 8-301; 220 ILCS 5/13-103(a) and (b); 220 ILCS 5/13-712(a). Parity by itself will not fulfill Sections 13-712(a), 8-301 or 13-102, and since it does not guarantee a minimum level of service.

Parity, as the Commission ordered in the *Merger Order,* is determined by comparing Ameritech's performance for the CLEC, to its performance for its retail customers, or its subsidiaries. Part 730 sets the minimum level of adequate service a carrier is to provide Illinois consumers. If Ameritech is allowed to provide service to a CLEC which would violate the minimum levels of service established by this

Commission pursuant to Part 730 (the "floor") without having to pay remedies pursuant to the Remedy Plan, Ameritech will be able to provide inadequate levels of service (below the standards in Part 730) to both its end users and to CLECs. Providing this level of service would cause CLECs to violate this Commission's minimum service standards in Part 730. In this circumstance, Ameritech's poor service quality, although it may be offered at parity to the service Ameritech provides to its retail customers and affiliates, would nevertheless operate in an anticompetitive fashion. Carriers could suffer irreparable injury to reputation under the guise of Illinois law, lose customers, and be unable to effectively compete in the Illinois telecommunications marketplace.

Consumers, who obtain their basic local service from CLECs that use Ameritech facilities, could receive service at a level below the standards set in Part 730. To ensure that consumers receive the minimum level of basic local exchange service, regardless of the carrier they use, the Remedy Plan needs to establish minimum levels of wholesale service for at least those categories of service that the Illinois legislature and this Commission have deemed to be important enough in Part 730 to establish as minimum retail levels.

There are a number of performance measures in the remedy plan that have corollary standards in Part 730.500 et seq., and the table below identifies those Part 730 standards. The first column of the table identifies the performance measure number and description, the second column identifies the comparable standard in the current Part 730, and the third column identifies comparable standard that Staff proposes in the Modified Part 730 (which is being litigated in Docket No. 00-0596):

Performance Measurement	Standard in Current Part 730	Standard in Staff Proposed Part 730

Benchmark Standards		
#21, #24 Average Speed of Answer, #80 Directory Assistance Average Speed of Answer, #82 Operator Services Speed of Answer, #83 Percentage of Calls Abandoned	Operator Answer Time (Part 730.510)	Operator Answer Time (Part 730.510)
Parity Standards		
#70, 70.1, 70.2 Trunk Blockage and Exclusions	Trunk Blockage (Part 730.520)	Trunk Blockage (Part 730.520)
#40 Percent out of service < 24 hours	Out-of-Service > 24 hours (730.535(a))	Out-of-Service > 24 hours (730.535(a) and (b))
#37 Trouble Report Rate	Customer Trouble Reports (730.535(g))	Customer Trouble Reports (730.545(a))
#27 Mean Installation Interval, #28 Percent Installation Completed within "X" Business Days, #29-33 Missed Due Dates	Installation of Service (730.540)	Installation of Service (730.540)
#41 Percent Repeat Reports		Repeat Trouble Reports (730.545(c))
#35 Percent Trouble Reports within 30 Days		Installation Trouble Reports (730.545(f))

See Ameritech witness Salvatore Fioretti Direct Testimony, Attachment 1.

Measuring performance measures with parity without a MLOS, Ameritech could provide basic local exchange service to CLECs at a level of performance below the standard set in Part 730, and still be in compliance with the remedy plan. Since Ameritech is providing service to the CLEC that does not comply with Part 730, the CLEC would not be able to comply with Part 730. This adversely affects Illinois consumers, CLECs and the growth of competition. Illinois consumers in Ameritech's service areas, who subscribe to CLECs, could receive service below MLOS as a result of Ameritech. The consumer will blame the carrier and switch their provider. The CLEC, pursuant to Staff's proposed Part 730 in Docket 00-0596, may be liable for providing the service that is less than Part 730 standards. By not imposing a MLOS on the wholesale performance measures, there would be a violation of the intent expressed in Section 13-712(a), since Illinois consumers would not receive minimum service quality on a nondiscriminatory basis.

The Proposed Order states that "the parity with a floor proposal would add unnecessary complexity to the Remedy Plan." First, as discussed above, despite some additional complexity, installing a minimum level of service is necessary to prevent anticompetitive behavior and to ensure Illinois consumers receive the minimum level of service quality whether they subscribe to Ameritech or a CLEC. Second, determination of a violation is not as complex as the Proposed Order states, since it only involves a simple additional step of comparing the performance Ameritech provides to CLECs to the set MLOS.

As the Proposed Order acknowledged, "further workshops would be required to identify the specific performance measures affected and the floor that would apply to each." Proposed Order at 24. Staff recommends that the Commission order further workshops and a second phase to this docket, and has provided a recommended procedure for the workshops in Attachment A.

Since the minimum level of service is not intended to incorporate Part 730 standards, incorporation by reference will not be permitted. The actual standard in Part 730, should be transferred into the business rules.

Accordingly, Staff recommends that the Commission Analysis and Conclusion Section on pages 24-28 be modified in accordance with the arguments Staff has set forth above. Therefore Staff proposes the following replacement language:

D. Commission Analysis and Conclusions

We adopt Staff's proposal to apply a minimum level of service for those performance measures that have comparable standards in Part 730. The minimum level of service shall be the standard in Part 730, since that is the minimum level of basic local exchange service carriers in Illinois are to provide to consumers. We decline to adopt ~~both~~ the CLECs' proposal for parity with a floor ~~and Staff's variation thereof~~. As an initial step, Staff's~~both these~~ proposal~~s~~ calls for Ameritech to provide wholesale service at the same level of service ~~as~~ that it provides to its retail customers. In other words, a parity standard. Under these proposals, if Ameritech's wholesale service falls below the minimum level of service set forth in Part 730~~retail service quality~~, it would be required to pay a remedy. Under Staff's proposal, further workshops would be required to identify the specific performance measures affected and the standard for minimum level of service that would apply to each. The CLECs'~~e~~ proposal~~s~~, however, goes one step further.

The CLEC Plan calls for 17 of the performance measures, with their corresponding sub-measures, to have an additional standard that CLECs call the "floor". These performance measures are ones that CLECs consider to be key and include, among others, average installation interval (PM# 55) and mean time to restore (PM# 67). In practice, therefore, Ameritech could be providing parity service, but if it is at a level below the floor, then it would be assessed a remedy. For example, Ameritech could be installing service (PM# 55) within five (5) business days for both retail and wholesale customers, in other words, parity service. The CLEC Plan includes a floor on this performance measure of four (4) business days. Therefore, Ameritech would owe remedies because wholesale service fell below the floor.

~~The Staff Plan is similar in that it calls for an additional standard below which Ameritech would owe remedies. The difference is that Staff proposes to make the floor Part 730, Standards of Service for Local Exchange Telecommunications Carriers. 83 Ill. Adm. Code 730. If we adopt Staff's proposal, further workshops would be required to identify the specific performance measures affected and the floor that would apply to each.~~

Our first concern is with the CLEC plan, that ~~CLECs and Staff are unable to agree on a floor.~~ the 17 CLEC floors are drawn from several sources, including other states' regulations and CLEC internal sources. Staff believes, contrary to the CLECs, that Part 730 is the primary source of Illinois' minimum levels of telephone service quality and that any measure not set forth in Part 730 should not be used in the Remedy Plan until endorsed by the Commission. On this point, we agree with Staff. Merely stating that CLECs or other state commissions have approved a standard is not sufficient and we are not, in this proceeding, presented with evidence supporting the validity of these standards.

~~We do, nonetheless, disagree with Staff and find that imposing Part 730 as a floor is inappropriate. Although revisions of Part 730 are currently being considered, the current Part 730 contains the following statement of applicability:~~

> ~~This Part shall apply to the relationship between a serving local exchange carrier and its end user customer only. This Part shall not be applicable to the relationship between a serving local exchange carrier subject to this Part and any local exchange carrier that provides facilities or services to the serving local exchange carrier for provision to its end user customers. 83 Ill. Admin. Code 730.100.~~

Clearly, Part 730 states that its service quality standards are limited to retail service. The Commission, is charged with a duty to protect the consumers interest in receiving adequate service quality pursuant to Sections 13-103 and 8-301. Moreover, pursuant to 220 ILCS 5/13-712(a) this Commission has a responsibility to issue orders that ensure “that every telecommunications carrier meets minimum service quality standards in providing basic local exchange service on a non-discriminatory basis to all classes of customers.” Since Part 730 establishes the minimum level of basic local exchange service carriers are to provide Illinois consumers, that should remain the floor for wholesale performance measures. Furthermore, anytime the standards in Part 730 are updated, the Ameritech business rules should also be automatically updated, so as to ensure that Illinois consumers obtain adequate service.

Further, at this time in Illinois, no wholesale service quality rules exist. Recently enacted Section 13-712(g) directs the Commission to establish and implement carrier to carrier wholesale service quality rules and establish remedies to ensure enforcement of the rules. On August 8, 2001, the Commission entered an Order initiating such a rulemaking proceeding pursuant to this statutory provision. (*See* Docket 01-0539, Implementation of Section 13-712(g)). Since this docket is ongoing, there are no Commission approved standards to reference, and therefore will not be entertained at this time, although we do see merit in referencing these standards in Illinois remedy plans when they are implemented.

~~Not only is it not clear what the appropriate floor should be, but also the parity with a floor proposal would add unnecessary complexity to the Remedy Plan. As Mr. McClerren testified at hearing, the business rules~~

~~would now contain "two conditions for failure. One, the parity condition; and two, failure to meet Part 730 minimum requirements." (Tr. 359).~~

We note that this proceeding is a result of the SBC/Ameritech *Merger Order* in Docket No. 98-0555. The *Merger Order* has served not only as a guide for parties as they worked through the collaborative process, but also serves as a guide to formation of a final Remedy Plan. As such, we must follow the very clear directive pertaining to this issue contained in the *Merger Order,* which states:

> all performance measures must be based on comparison to performance that the Joint Applicants provide to their own operations and/or subsidiaries. The burden of proof shall remain on the Joint Applicants to demonstrate that no retail analogs exist and that benchmarks should be substituted. (*Merger Order* at 221).

At first blush it is easy to interpret this provision as only requiring a standard that is either parity or a benchmark. However, in light of the fact that if only parity was the standard of performance to be provided, Ameritech would be able to provide basic local exchange service to CLECs at a level of performance below the standard set in Part 730, and still be in compliance with the remedy plan it is clear that the Merger Order did not preclude incorporating the minimum standards already adopted by this Commission. However, there is a problem in that since Ameritech is providing service to the CLEC that does not comply with Part 730, the CLEC would not be able to comply with Part 730. This adversely affects Illinois consumers, CLECs and the growth of competition. Illinois consumers in Ameritech's service areas, who subscribe to CLECs, could receive service below MLOS as a result of Ameritech. The consumer will blame the carrier and switch their provider. Finally, in the *Merger Order,* when we ordered that performance measures be based on a parity standard, we never intended that Ameritech could then provide wholesale service to CLECs at a level below the minimum levels of service required in Part 730. Finally, allowing Ameritech to operate in such a way provides a confusing and unnecessary difference between the level of service Ameritech provides retail customers, as opposed to wholesale customers. Therefore, the *Merger Order* allows for standards to be imposed in addition to the parity standard.

~~The Federal Telecommunications Act of 1996 ("TA 96"), along with FCC and federal court interpretations of it are also relevant to our decision here. Non-discrimination is the focus of TA 96. The FCC, in the Kansas and Oklahoma Section 271 proceeding stated the following:~~

> ~~For OSS functions that are analogous to those that a BOC provides to itself, its customers or its affiliates, the nondiscrimination standard requires the BOC to offer requesting carriers access that permits competing carriers to perform these functions in "substantially the same time and manner" as the BOC."[3]~~

~~Further,~~Ameritech argues that the Eighth Circuit struck down FCC rules that are similar to what is being considered in this proceeding. ~~the federal courts have consistently held that parity, and only parity, is required.~~ Ameritech argues that the Telecommunications Act of 1996 (TA96) only requires that "'the (wholesale) quality be equal – not superior' to retail." The phrase "at least equal in quality" establishes a minimum level for the quality of interconnection; it does not require anything more. After reviewing the Eighth Circuits decision in *Iowa Utils. Board, et al. v. FCC*, 219 F.3d 744, 757 (8th Cir. 1999) ("*IUB II")* and 120 F.3d 753 (8th Cir. 1997) we find that the issue and decision of those cases are not relevant to this proceeding. The Eighth Circuit's decisions were limited to the whether 47 CFR §51.305(a)(4) complied with TA96. *Iowa Utilities Board et al. v. FCC*, 120 F.3d 753, 812-13. The Eighth Circuit found that carriers could not request superior quality service in their interconnection agreements. *IUB II* at 757-58. This is not an interconnection agreement, nor a request by a telecommunications carrier, this is a remedy plan ordered pursuant to state law (220 ILCS 5/7-204). Furthermore, Section 261(c) of the Telecommunications Act grants states the ability to establish standards that further competition. Therefore, the *Iowa Utilities Board* decisions are not relevant to this proceeding. Furthermore, an interpretation of the *IUB* cases, such as what Ameritech proposes, would severely limit the rights of this Commission to impose additional state obligations beyond those of TA96, and do so in a manner contrary to what is permitted under TA96. ~~e maintain our view that the superior quality rules cannot stand in light of the plain language of the Act for all the reasons we previously expressed. See Iowa Utils. Bd., 120 F.3d at 812-13. We also note that it is self-evident that the Act prevents an ILEC from discriminating between itself and a requesting competitor with respect to the quality of the interconnection provided. *Iowa Utils. Board, et al. v. FCC*, 219 F.3d 744, 757 (Court of Appeals, 8th Circuit, 1999) ("*IUB II").*~~

---

[3] ~~In the Matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, Released January 22, 2001, ¶ 104) ("Kansas/Oklahoma 271"). (See also, In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, Released June 30, 2000, ¶ 94).~~

~~As the CLECs state at the beginning of their Initial Brief "the nondiscrimination provisions of the Act, as interpreted by the FCC, obligate Ameritech to provide unbundled elements, resale services, and a host of other wholesale services a level equal to that provided by Ameritech to its own retail end "in terms of quality, accuracy and timeliness." (CLEC Initial Brief at 2). Staff witness. McClerren made a similar observation at the hearing, "as long as Ameritech is providing the same level of service to its CLEC customers as it is to its own retail customers, it is within compliance of the law, technically." (Tr. 363).~~

~~Staff also appears to recognize that parity is the law, but nonetheless still recommends that parity with a floor be adopted. Staff cannot have it both ways, either federal law requires wholesale service to be provided in parity with retail service or it does not. In its Initial Brief, Staff states: "An ILEC should provide wholesale service to a CLEC in the same manner that it would provide service to its own end user customers." (Staff Initial Brief at 12). Fifteen pages later, Staff states that the parity with a floor proposal "<u>could</u> economically motivate SBC/Ameritech Illinois to provide better service to CLECs than it provides to its own retail customers [ ] in the instance where SBC/Ameritech Illinois is not meeting the minimum service quality standards contained in Part 730." (Staff Initial Brief at 17). We cannot adopt any proposal that Staff recognizes might encourage an ILEC to distinguish between the service quality provided to its retail customers and the service quality provided to its wholesale customers.~~

~~Additionally, we do not find credible the CLECs' statement that "CLECs do not want superior service; they want to avoid inferior service for all customers now and in the future." (CLEC Reply Brief at 22). CLECs would like nothing better than to have Ameritech provide poor retail service and for CLECs to be able to offer their own end customers better service. CLECs want to compete with Ameritech. We are not here to pick sides, merely to ensure a level playing field.~~

~~If Ameritech is subjected to high penalties in this case, which could presumably be higher than the penalties provided for by the minimum service quality rules of Part 730, then Ameritech would be more concerned about providing minimum service quality to CLECs than to retail. In response, Ameritech may develop OSS systems that distinguish between Ameritech and CLECs. Currently many of these systems are automated and cannot distinguish between users. For these reasons, we decline to adopt the parity with a floor proposal.~~

We also find that performance measures that call for a parity comparison should base that comparison on service provided either to Ameritech retail customer or to Ameritech's affiliate. This is consistent with the *Merger Order* requirement that performance measures be compared to Ameritech's own operations and/or subsidiaries. (*Merger Order* at 221). The *Merger Order* defines the term affiliate which is applicable here in determining which Ameritech affiliates are subject to a parity comparison (*Merger Order* at 172).

We note that several of the performance measures already call for a comparison to Ameritech's affiliate, such as PM# 1.2 and PM# 58. Prior Commission decisions support this comparison. The *OSS Rehearing Order*, Docket 00-0592, required a parity comparison to Ameritech Advanced Data Services, an Ameritech affiliate. (*OSS Rehearing Order* at 45).

In addition to comparisons to Ameritech's affiliate when no Ameritech retail equivalent exists, we find that all parity measures should be compared to both Ameritech retail customers and Ameritech's affiliate. Whichever of these two receive the better service is the appropriate comparison to determine if CLECs are receiving parity service.

The Commission concludes that the comparison to service provided to Ameritech's affiliates as well as service to its own retail customers should be part of the remedy plan. Section 251 of TA 96 requires that Ameritech not provide inferior service to the CLECs as compared to its affiliates. A comparison to the performance Ameritech provides its affiliates or retail customers, whichever is better, shall, therefore, be part of the Remedy Plan approved by this order.

<u>We agree with Staff that workshops will be needed to determine the specific performance measures that have comparable standards in Part 730, and the standard for minimum level of service that would apply to the performance measures.</u>

<u>Using parity with MLOS will result in two methods by which Ameritech could trigger a remedy liability. Liability would be assessed on the MLOS the same as they are assessed on a benchmark. If Ameritech fails to meet the MLOS, and fails to provide service that is in parity, Ameritech will pay the greater remedy payments of the two standards. If Ameritech provides service that is within parity, but is below the MLOS, then Ameritech would pay the remedy as if it failed to meet a benchmark, and vice versa for providing service outside of parity, but above the MLOS.</u>

<u>Staff anticipates that the workshops would perform three functions. First, Staff will identify which performance measures standards correlate to standards in Part 730.50 et seq.,. Prior to the workshop Staff will disseminate a modified business rule to the parties, and that modified business rule will identify the performance measures that will have a minimum level of service, and the minimum level of service standard.</u>

Second, the parties would then identify and resolve and differences between the Part 730 standard and the performance measure. Finally, the parties will either file with the Commission, in this docket, a modified business rules that identify the agreed upon performance measures that will have a minimum level of service, and the minimum level of service standard, or they will file a joint petition for a hearing.

Since the minimum level of service is not intended to incorporate Part 730 standards, incorporation by reference will not be permitted. The actual standard in Part 730, shall be transferred into the business rules.

To the extent the parties can not reach agreement on an issue(s), Staff recommends the Commission order the parties to file a joint petition requesting a expedited form of hearing. Since the issue in question appears to be narrowly focused, Staff recommends that the Commission set forth an expedited hearing process for this situation. Staff recommends the following process: within 15 days of the second collaborative meeting, all parties shall file a joint petition. Attached to the joint petition will be a modified business rule, that identifies the performance measures that the parties agree will have a minimum level of service, and the minimum level of service standard they agreed upon. The parties will file direct testimony within fifteen days of the filing of the joint petition, and file rebuttal testimony within seven days of the date responsive testimony was filed. A hearing should be held within seven days of the date of the filing of rebuttal. Briefs on exceptions and reply to briefs on exceptions should be filed within two and three weeks, respectively, of the proposed order. The Commission order should be made 60 days after hearings.

The Remedy Plan has been modified to reflect this decision by adding the phrase "or its affiliate's performance." (*See*, Attachment A). These changes shall be reflected in Ameritech's business rules, automatically incorporated into current interconnection agreements, and should replace, in its entirety, the current Texas Remedy Plan that is part of the tariff.

EXCEPTION 4 **Section XII: The Current Ameritech Remedy Plan Tier 1 Payments Should be Tripled and Performance Measure Weighting Adversely Affects the Entire Performance Remedy Plan**

Staff takes exception to the Proposed Order's doubling of the Tier 1 Multiplier on two grounds. The first is that the Tier 1 payments are part of a package of remedy payments. Reduction in the Tier 1 payments thwarts the overall effectiveness of the remedy plan. If Tier 1 payments are not tripled the remedy plan, as was modified by Staff, will not trigger a Commission investigation as Staff had intended, and would allow Ameritech to provide a lower level of service. Second, Staff points out that the Tier 1 payments are woefully inadequate to compensate the CLECs for loss and injury relating to violations of the performance standards. As a result, doubling of the Tier 1 payments does not sufficiently compensate CLECs and, moreover, tripling of the Tier 1 payments will not run any risk that the CLECs are overcompensated.

a. Only Doubling the current Tier 1 Payments in the Current Remedy Plan Adversely Affects Entire Performance Remedy Plan

The Proposed Order's decision to only double the Tier 1 payments, and to provide performance measure weights less than "high" priority adversely affect the entire performance remedy plan. Staff's approach in setting the payment structure of the remedy plan was "to improve Ameritech's service performance so as to open its market for competition." Staff RB at 27. Given Staff's approach, Staff proposed, and the Proposed Order accepted, that the annual cap be set at 36% of Ameritech's net return, and that the cap would also serve as an indicator of Ameritech's poor service and trigger a Commission investigation. Proposed Order at 38. However, altering the Tier 1 payments and the performance measure weightings, as the Proposed Order has done, makes the remedy plan less effective than what Staff has proposed. Specifically, the Proposed Order deviated from Staff's proposal by only doubling Tier 1 payments, instead of tripling them, and by reducing the performance measure weightings so that not all measures would be designated as "high."

Staff's proposed changes to the Ameritech remedy plan work as a package. Among other adjustments, that package includes an annual cap of 36% of Ameritech's net revenues, Staff IB at 10, removal of the k-table, *id.* at 7-8, use of a bright-line benchmark test, *id.* at 8, use of a single critical value instead of a table, *id.* at 9, tripling of both tier 1 and tier 2 payments, *id.* at 10, and designating all performance measures a "high" priority, *id.* at 9. Consequently, any changes to the five factors listed above impacts the annual cap and its ability to act as an incentive for Ameritech to provide good service. Specifically, the two deviations the Proposed Order has taken from Staff's proposal, markedly reduces the likelihood Ameritech's remedy payments will breach the 36% mark; thereby allowing Ameritech to provide service that is worse than what Staff had intended in its proposal.

Stated another way, under Staff's proposal (all performance measures have a high designation, and both Tier 1 and Tier 2 penalties are tripled), Ameritech would need a certain number of violations to reach the 36% of net return cap. Since the Proposed Order is deviating from Staff's proposal, the amount of remedy liability that Ameritech incurs changes, and consequently, so does the number of violations needed to reach the 36% mark. Reducing the multiplier of the Tier 1 payment, and reducing the weight of the performance measures from a designation of "high", reduces the overall remedy payment per occurrence. Therefore, for Ameritech to reach the 36% mark, it will need to incur more violations, which means that Ameritech will have greater incentive to provide service below what would be expected if Staff's entire proposal was adopted.

The Proposed Order's findings regarding the Tier 1 multiplier and performance measure weighting fundamentally alters the effectiveness of Staff's plan. The Proposed Order's holdings on these two issues allows Ameritech to provide services or facilities to a competitor, at a level below what Staff proposes. That level of service could be anticompetitive, and certainly increases the likelihood that Illinois consumers will receive a lower quality of service. The reduction in service quality would place the competitor at a severe disadvantage, forcing the new entrant to pass along the inferior service to its actual or potential subscribers. This could damage the new entrant's good will with consumers, perhaps irreparably, and thwart the new entrant's ability to gain market share.

Therefore the Proposed Order either needs to adopt Staff's proposals on these two issues, or to increase the Tier 2 assessments so that the 36% mark would be met in approximately the same number of violations as if the remedy plan was operating under Staff's modifications.

If Staff's proposal's regarding Tier 1 payments and weighting of performance measures are not adopted, given the adverse impact the Proposed Order's changes would have on the 36% mark effectively acting as a trigger for a Commission investigation, Staff suggests that a provision be added to the Performance Remedy Plan to preserve the Commission's ability to change the plan as needed. Staff recommends that the Commission monitor Ameritech's performance under the audit provisions approved in the Proposed Order, but reserve for itself the ability to initiate a proceeding to either increase or decrease the Tier 1 and Tier 2 multiplier, or make other changes as necessary to achieve the purposes of the Performance Remedy Plan.

b. *<u>Tripling of Tier 1 Payments in Current Remedy Plan is Reasonable</u>*

Staff continues to advocate that Tier 1 penalties be tripled because it is a reasonable estimation of, or compensation for the harm to, the CLECs for poor service.

The Proposed Order raises as a concern that the amount of Tier 1 payments, as liquidated damages, "… must be a reasonable forecast of, or just compensation for, the harm that is cause by the breach, and the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation." Proposed Order at 33. Elsewhere in this brief, Staff requests that the Proposed Order be clarified so as not to rely on contract terms of art such as "liquidated damages" because they are unnecessarily confusing and not directly applicable in the context of a remedy plan imposed under a regulatory scheme. Notwithstanding this clarification, Staff agrees that the Tier 1 payments must reasonably compensate the CLECs for the harm that is caused by the violation of the performance measures (breach of a contract is not directly applicable).

Even under a "liquidated damages" analysis, however, there is sufficient evidence that the $25 to $75 per occurrence Tier 1 payment is so low that it cannot possibly begin to compensate the CLECs for the loss of revenue, loss of reputation, administrative expenses in responding to customers, and the numerous other damages that they incur with respect to each violation. Moreover, the CLECs cannot ascertain these damages with any degree of accuracy but, under a liquidated damages analysis, that is not a defect but, rather an essential component of liquidated damages. Proposed Order at 33. If the CLECs could ascertain their damages, they would not be entitled to liquidated damages since the law provides that in order to liquidate damages, actual damages must be "incapable or very difficult of accurate estimation." Proposed Order at 33. As a result, Staff also points out that the Proposed Order, if it retains the liquidated damages concept must be clarified to provide that evidence of actual damages is not required. ("Without any evidence of actual damage that CLECs suffer…, we are reluctant, for Tier 1 penalties, to triple the amounts.") Proposed Order at 34. Rather, what is required, and has been provided, is evidence of the reasonableness of the estimate of damages and evidence that the damages are difficult to calculate with accuracy. Proposed Order at 33. To summarize, Staff agrees with the Proposed Order's finding that Tier 1 payments (whether or not they are characterized as liquidated damages) should be a "reasonable forecast of just compensation for the harm that is caused by the breach." Proposed Order at 33 (citing *Bauer v. Sawyer*, 8 Ill.2d 351, 359 (1956)). Staff however disagrees with the Proposed Order's finding that "evidence of actual damage that CLECs suffer" is needed to calculate liquidated damages. The *Bauer* Court clearly notes that as a liquidated damage "the harm that is caused by the breach is <u>one that is incapable or very difficult of accurate estimation</u>." *Bauer*, at 359. Therefore, the inability for AT&T witness Dr. Kalb to estimate the monetary damages CLECs would incur as a result of Ameritech's poor performance is understandable, given the types of damage A CLEC would incur: injury to reputation, loss of goodwill.

The Illinois Commission has not addressed the reasonableness of payments an ILEC is to make pursuant to a performance remedy plan, however the Minnesota Public Utility Commission (MPUC) has addressed credits for poor performance as part of an interconnection agreement. AT&T/USWEST Arbitration[4] I at *127. In that proceeding it clearly articulates the types of harm a carrier would experience as a result of the ILEC providing poor performance, stating that

[4] *In the Matter of the Consolidated Petitions of AT&T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996* Docket No. P-442, 1996 Minn. PUC LEXIS 161 (Dec. 2, 1996) ("AT&T/USWEST Arbitration I")

> an incumbent's noncompliance with quality standards could cause a new entrant to lose customer good will or impede the new entrant's ability to gain market share. It would be very difficult to quantify these damages with much precision. The Commission cannot envision how it might determine exactly how many customers a new entrant would lose because of failures in the incumbent's network, or what the associated losses in revenue would be. Nor can the Commission imagine placing a precise dollar value on the damage to the new entrant's reputation. Clearly, the typical case-by-case calculation of damages after the fact would not work here.
>
> Given these uncertainties, AT&T's proposed credits provide a reasonable estimate of the damages associated with failure to meet the quality standards in the contract. The credits include, for example, a $ 25,000 per day charge for an impermissible delay not specific to an individual customer. This amount pales next to US WEST's daily intrastate revenues of approximately $ 2.5 million. Yet, the impact of such a delay on the CLEC could be substantial, steering its current or potential customers away from the CLEC and creating long-standing harm to its reputation.
>
> AT&T/USWEST Arbitration I at *127-28.

The MPUC later reduced the $25,000 credit amount to $2500 per occurrence. AT&T/USWEST Arbitration II at *100-01.[5] Given the complexity of determining the dollar value of goodwill and loss of current and prospective customers, Staff's proposal to triple the Tier 1 payments[6] set forth in the Ameritech Remedy Plan is a reasonable dollar amount to compensate CLECs for the harm they would receive. Tripling the Tier 1 payments, as Staff proposes, results in a range of compensation, from $450 to $2400 per occurrence (varying due to number of months the violation continues). The loss of corporate goodwill, as well as current and prospective customers, is more than $2400.

---

[5] *In the Matter of the Consolidated Petitions of AT & T Communications of the Midwest, Inc., MCImetro Access Transmission Services, Inc., and MFS Communications Company for Arbitration with US WEST Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996*, Docket No. P-442,421/M-96-855; P-5321,421/M-96-909; P-3167,421/M-96-729, 1997 Minn. PUC LEXIS 49 (March 17, 1997) ("AT&T/USWEST Arbitration II").

[6] Staff acknowledges that its original intention for tripling Tier 1 payments was as a secondary mechanism to bring the overall level of penalties paid by Ameritech closer to the 36% of net return. Staff Ex. 2.0 at 10.

Furthermore, the AT&T/USWest Arbitrations found that $2500 was a reasonable estimation of the harm poor performance causes to CLECs.

The Proposed Order misunderstands Staff's position when it relies on Staff's concerned about CLECs receiving too much compensation. Proposed Order at 33-34. Staff's concern about overcompensation was if CLECs received compensation above tripling of the current remedy payments that they might receive a windfall. Further, it would be contradictory for Staff to recommend a Tier 1 payment structure that it viewed as being over-compensation.

Accordingly, Staff recommends that the Commission Analysis and Conclusion Section on pages 32-34 be modified in accordance with the arguments Staff has set forth above. Therefore Staff proposes the following replacement language:

D. Commission Analysis and Conclusions

> Both the Ameritech Plan and the CLEC Plan call for payments to be divided between two tiers – Tier 1 and Tier 2. There is no dispute regarding this division of remedies. Monetary consequences for performance failures affecting individual CLECs are payable to the affected CLEC as Tier 1 Payments~~compensatory damages or liquidated damages (Tier 1)~~, while performance shortfalls to the industry are payable to a governmental agency as Tier 2 Payments~~regulatory fines or forfeitures~~ in order to protect the public interest (Tier 2).
>
> Staff proposes that all penalties be tripled, in both Tier 1 and Tier 2. Dr. Patrick testified that it is unlikely, with the current Ameritech Plan, that Ameritech will ever reach the annual cap. (Patrick Direct at 60). She believes that Ameritech's behavior is not influenced by these penalties, "given that nearly half of the performance items for which Ameritech owed penalties, according to their calculations, persisted across those three months [October, November, December]." (*Id*.). If remedies are tripled, Dr. Patrick testified that annual amounts would reach just over $160 million, still far short of the total annual cap recommended by the FCC. (*Id*. at 68).
>
> Tier 1, as specified in the *Merger Order*, is designed to compensate CLECs for poor performance in the form of "incident based liquidated damages." (*Merger Order* at 221). CLECs state in their Initial Brief that

"Tier 1 payments are intended to at least partially compensate CLECs for the harm incurred because of the performance failure." (CLEC Initial Brief at 16).

The CLECs admit that no attempt has been made to calculate the amount necessary to compensate them adequately for poor performance. (Tr. at 285). The law on liquidated damages provisions is clear that in order for such a provision to be enforceable, the amount must be a reasonable forecast of, or just compensation for, the harm that is caused by the breach, and the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation. *Bauer v. Sawyer*, 8 Ill. 2d 351, 359 (1956).

Dr. Kalb, a CLEC witness, testified at hearing that it would be difficult to determine, which is in line with the idea of liquidated damages, ahead of time the monetary damages that CLECS suffer as a result of poor Ameritech service and he stated the following reason:

> there seems to be lots of variability in what would be an appropriate compensatory amount dependent on the nature of the customer, dependent on the services that the customer had, dependent on the geographical region which the customer was operating. So although we haven't done - - although we haven't done specific studies, we are - - we are sure that $25 in any of these reasonable cases would not be an adequate form of liquidated damages." (Tr. 285).

We note that $25.00 is the per occurrence dollar amount for performance measures in the low category for the first month that Ameritech fails. (Ameritech Remedy Plan at 10). ~~We must balance the belief of CLECs that this is inadequate compensation, with the worry of Staff that if remedies are too high, CLECs might prefer Ameritech to fail, rather than getting good service. (Patrick Direct Testimony at 10)~~

Based on our review of the record, we do not believe that the Tier 1 Payments~~liquidated damage amounts~~ are sufficient. CLECs do not make any specific recommendation for increasing the dollar amounts in Ameritech's Plan; they suggest instead the per remedy penalties as discussed and rejected above. Staff recommends that all dollar amounts be tripled. Given that the types of damages CLECs would incur, loss of good will and injury to reputation, damages which are difficult, if not impossible to accurately account for, and have such an impact on competition, we find that the current Tier 1 remedies are too low and that tripling them is appropriate.~~Without any evidence on the actual damage that CLECs suffer and in view of the Staff concern of over-compensating CLECs, we are reluctant, for Tier 1 Paymentspenalties, to triple the amounts. Therefore, Tier 1 remedies, which CLECs testify are currently too low, will be doubled.~~

> Tier 2 Payments~~penalties~~ do not generate the same concerns as Tier 1. There is no fear that Ameritech will merely be subsidizing its competitors. The Commission shares the CLECs' and Staff's concern that the Ameritech Plan will not provide sufficient incentives for Ameritech to improve its service. As a result, we adopt Staff's proposal of tripling payments~~penalties~~ in Tier 2.

EXCEPTION 5: Clarification of Tier 1 and Tier 2 Payment Terminology

Staff takes an exception to the Proposed Order in order to clarify the use of the Proposed Order's terminology, found throughout the Proposed Order and the Remedy Plan, but particularly in Section XII of the Proposed Order. The parties, including Staff, have unfortunately used terminology somewhat loosely regarding the Remedy Plan payments. As a result, this usage has understandably leaked into the Proposed Order. Staff specifically is concerned that the Proposed Order interchangeably uses the phrases "liquidated damages," "compensatory damages" and "penalties. " In addition, because these terms have distinct meanings under general contract law, the use of these terms in the context of a remedy plan, even if used in accordance with their meaning under contract law, may cause unnecessary confusion. Moreover, these terms of art may not be relevant in this context.

The remedy plan payments were first characterized as "liquidated damages" by the Joint Applicants in the Merger Order when they made a commitment, in exchange for Merger approval, to the Commission to import the Texas performance remedy plan, which included payments referred to as "incident-based, liquidated damages."[7] See *Merger Order*, at 203-04. The Commission, subsequently, ordered Ameritech to import to Illinois the Texas performance measures and remedy plans, to be modified in accordance with the *Merger Order*, in order to have a plan in effect as soon as possible.[8] In importing the Texas plans, the Commission also imported the descriptive label "liquidated damages" already contained in the Texas remedy plan without making a specific determination that the label was appropriate either in the context of the Texas remedy plan or in the remedy plan to be adopted here in Illinois[9].

The label "liquidated damages" is a term of art under contract law and may be misunderstood in the context of a remedy plan. Staff believes that employing the phrase "liquidated damages" may cause unnecessary confusion.[10] In Illinois, parties to a contract may specify a particular sum as liquidated damages in instances where damages are difficult to ascertain. Such agreements are generally binding. However, when the sole purpose of the clause fixing damages is to secure performance of the contract, the clause will be deemed a penalty provision and therefore unenforceable. *See e.g., Stride v. 121 West Madison Bldg.*, 132 Ill. App. 3d 601, 605, 477 N.E.2d 1318, 1321 (1st Dist. 1985). To ascertain whether a liquidated damages provision is merely a penalty and therefore void, it must be determined whether (1) the amount established is reasonable in light of the anticipated or actual loss caused by the breach and (2) a level of difficulty exists in proving that a loss has occurred, or in establishing the amount of

---

[7] The remedy plan was to be applied to whatever set of benchmarks ultimately emanated from the Illinois collaborative process on measurements and benchmarks. See Merger Order at 204.

[8] The Texas performance measures and remedy plans, thus, were to provide the basic framework around which the Illinois collaborative effort was develop performance measures and remedies specifically tailored to conditions here in Illinois. If any issues were unable to be resolved through the collaborative process, unsatisfied parties to the collaborative could bring their complaints to the Commission. The instant proceeding was initiated because of the various issues that could not be resolved in the collaborative process. See Joint Petition generally.

[9] The CLECs presented evidence in this proceeding that they did not have much input into the Texas Remedy Plan collaborative. Tr. at 137.

[10] The Proposed Order refers to Tier 1 damages as "liquidated damages" on page 31. On page 32, the Proposed Order refers to Tier 1 payments as "compensatory damages or liquidated damages." Proposed Order, 31, 32.

the loss with reasonable certainty. *See e.g., Pay-Saver Corp. v. Vasso Corp.*, 143 Ill. App. 3d 1013, 1019, 493 N.E.2d 423, 427 (3rd Dist. 1986).

Although, the parties to the collaborative are attempting to fix the amount of compensatory payments in advance, and they do seem to be difficult to ascertain, other aspects of the remedy plan payments may not qualify as liquidated damages. Notably, the Commission in the *Merger Order* stated that the purpose of the remedy plan was to provide incentive for compliance. *Merger Order*, at 224-25. Providing Ameritech incentive to comply with the performance measures does not fit a liquidated damages model. While the Commission may be referring to Tier II payments only when it discusses providing incentives to Ameritech, this illustrates Staff's point that the use of these terms interchangeably can be problematic.

Liquidated damages is a creature of contract law, and, therefore, is somewhat out of its element from the get go in the remedy plan context. The remedy plan is a safeguard and incentive feature implemented as a result of the *Merger Order.* Having gone through various permutations in the collaborative and also here in this docket, the remedy plan payments really do not require the use of this terminology. In addition, these terms of art do not relate to the remedy plan payments except in a general way. For instance, Tier I payments are payments that generally intend to reasonably compensate the CLECs for poor service quality. Tier II payments are intended generally to provide Ameritech with incentive to provide better service across the board to all CLECs. Overall, however, the payment of both Tier I and Tier II payments may be perceived to provide Ameritech with incentive for compliance.

On the other hand, the remedy plan payments also do not fit the compensatory damages model either. The Illinois Supreme Court has found that the: "plain meaning of the term 'compensatory damages' is a monetary award paid to a person as compensation for loss or injury." *In re Consolidated Objections to Tax Levies of School District No. 205*, 193 Ill. 2d 490, 497, 739 N.E.2d 508, 513 (2000). In general, compensatory damages are similar to actual damages. They can be ascertained after the fact with precision. As the CLECs acknowledge, and the Proposed Order notes, it would be extremely difficult to prospectively determine the amount of damages that a CLEC could incur due to Ameritech's failure to comply with a performance measure. Proposed Order, at 33. In fact, as the Proposed Order points out, the CLECs admitted at the evidentiary hearing that "no attempt ha[d] been made to calculate the amount necessary to compensate them adequately for poor performance." *Id.* As the Proposed Order explains, the CLECs testified "that it would be difficult to determine ahead of time the monetary damages that CLECs suffer as a result of poor Ameritech service." Proposed Order at 33.

With the above nomenclature discussion in mind, Staff recommends that all references to "liquidated damages," "compensatory damages" and "penalties" be eliminated from the remedy plan and replaced with language that does not constitute terms of art under contract law and may not be directly applicable in this context. Staff recommends that the remedy plan utilize the phrases "CLEC payments" or "Tier I payments" when referring to the Tier I payments. Staff also recommends that the remedy plan utilize the phrase "General Revenue Fund Payments" or "Tier II payments" when referring to the Tier II payments rather than "regulatory fines or forfeitures." Proposed Order at 32.

EXCEPTION 6 **Section XIII: Ameritech's Monthly Reports Need to be Improved so Staff can Monitor Whether Ameritech Reaches an Annual Cap Within the First Nine Months of the Year**

The Proposed Order is silent regarding improvements to reporting that Staff noted in its brief and during the hearing. To monitor whether Ameritech reaches an annual cap within the first nine months of the year Staff proposed that Ameritech file monthly reports with Staff. Tr. 335-36. Currently, Ameritech provides monthly reports to Staff. Staff recommends that Ameritech improve those monthly reports by increasing the level of detail, and provide Staff with the ability to ask questions, and request modifications to the report. Staff prefers that these reports be revised over time while working with Ameritech, rather than setting forth a requirement at this time.

Accordingly, Staff recommends that sub-section C. Staff's Position and section D Commission Analysis and Conclusion to be modified so that Ameritech will improve the detail in its monthly reports and work with Staff in making modifications to the report over time.

Thus Staff proposes the following paragraph be added after the third paragraph in Staff's Position on pages 35-36 of the Proposed Order:

> To monitor whether Ameritech reaches an annual cap within the first nine months of the year, Staff proposes that Ameritech file monthly reports with Staff. Tr. 335-36. Currently, Ameritech provides monthly reports to Staff. Staff recommends that Ameritech improve those monthly reports be increasing the level of detail, and provide Staff with the ability to ask questions, and request modifications to the report. Staff prefers that these

reports be revised over time while working with Ameritech, rather than setting forth a requirement at this time.

Thus Staff proposes the following paragraph be added after the last paragraph in the section titled Annual Caps in Section D Commission Analysis and Conclusion, page 37 of the Proposed Order:

> <u>Finally, Staff recommends that the current monthly reports Ameritech provides to Staff be used to monitor whether Ameritech reaches an annual cap within the first nine months of the year. The Commission agrees with this modification. Further, Staff and Ameritech will operate in a fluid process, whereby Ameritech and Staff work hand-in-hand, over time, to develop and modify the monthly reports so that they provide the information Staff needs to monitor Ameritech's performance, without overtaxing Ameritech's computer network. Ameritech is directed to improve the level of detail in the monthly reports under Staff's direction, and Staff will have the ability to ask questions, and request modifications to the report until the Performance Remedy Plan is terminated.</u>

EXCEPTION 7 <u>Section XIV</u>: All Performance Measures should be Designated as High, Otherwise the Annual Cap is No Longer the Bellwether Indicator of Poor Service, but of Miserable Service

Staff takes exception with the Proposed Order's findings that all performance measures should not be designated as "high" measures, that the current ranking of performance measures shall remain in place, and that only the CLECs and Ameritech are to meet in collaborative sessions to assign weights to the performance measures. *See* Proposed Order at 42. As discussed in Exception 4(a) above, Staff's proposed changes to the Ameritech remedy plan work as a package. As such, changes to that plan (such as what the Proposed Order has made regarding Weighting of Performance Measures) have a consequential negative effect on the annual caps ability to act as an effective incentive for Ameritech to provide adequate service. Staff Ex. 2.0 at 54. While the Proposed Order accepts many of Staff's recommendations, all of its recommendations need to be implemented for the proposal to work effectively. Furthermore, unless the Proposed Order is modified to extend the Remedy Plan beyond October 2002, there is little practical justification warranting workshops.

The Proposed Order correctly notes that Staff's recommendation to assign all performance measures an equal weighting of "high" was based primarily on the history of the development of those measures. Proposed Order at 41. However, the Proposed Order omitted a second reason argued by Staff -- that classifying measurements by the supposed importance of the service being measured will tend to weaken the incentive structure provided by the performance remedy plan. Staff Ex. 2.0 at 54. The performance measurement designations provided in the Ameritech remedy plan are unnecessarily complex. *Id*. at 55. Making all measurement designations "high" will provide the highest penalties, and give Ameritech the necessary incentive to provide service that meets the required performance standards. *Id*. at 55-56. For the foregoing reasons, the Proposed Order should assign equal importance weightings to all performance measures, assign high penalty amounts to all performance measures, and not order further collaborative sessions.

There is no benefit to order Ameritech and the CLECs to establish weights for performance measures through workshops if the remedy plan is only going to remain in effect until October 2002. This order would be a waste of time and resources. Therefore, Staff does not support the use of collaborative workshops to set weights for the performance measures, unless that the Proposed Order finds that the remedy plan does not expire in October of this year.

If the remedy plan is to be extended beyond October 2002, then as an alternative position, Staff would support the use of workshops to set the priority weights of performance measures. The Proposed Order, however, is unclear as to what is to be done in the collaborative workshops, who is to manage them, and how long they should meet. There are also many collaborative dynamics that the Proposed Order has not taken into consideration. For example, not all parties are represented at collaborative meetings, making it difficult to develop a representative, consensus document. Small carriers may not be able to afford to send representatives to the collaborative meetings, so their interests may not be factored into the collaborative discussions. Staff has attached to this Brief, as Attachment A, a procedure for the workshops that should help resolve many of issues Staff raises. Staff continues to believe making all designations "high" to be the optimal manner in which facilitate a competitive environment.

However, if the ALJs and the Commission determine that modification of the current designation format is all that is required, Staff suggests that the Proposed Order clarify four items related to "low, medium, or high" designations.

The Proposed Order does not clearly state what standard the parties should use in determining whether the performance measure receives a high, medium or low designations -- should there be an equal number of high, medium and low measures or will it vary. Is it the intention of the ALJs that the relative number of high, medium and low designations currently in the SBC/Ameritech Illinois wholesale service quality performance plan is going to remain the same after the collaborative workshop is concluded? Staff believes that the collaborative process could be a successful manner in which to determine which measures should be designated “high,” “medium,” or “low.” However, Staff does not believe the collaborative process would be effective at determining how <u>many</u> “high” designations there should be in the wholesale service quality performance measure plan. That decision should be made in this docketed proceeding.

The Proposed Order only required Ameritech and CLECs to participate in the collaborative workshops, but said nothing about Staff’s role. Is Staff to be included in the collaborative meetings as a participant, facilitator, or both, or just CLECs and Ameritech as stated? Staff was both a facilitator and participant in Condition 30’s effort to develop wholesale service quality performance measures. Staff was able to administer the proceedings as a neutral third party, and was also able to introduce concerns of parties not represented at the collaborative.

Furthermore, it is unclear when the collaborative workshops should be completed, how many meetings should be held, and how to present the findings. In Attachment A Staff has set forth a procedure for an expedited hearing process.

Given the uncertainty of this workshop process, it is easier to assign all performance measures a designation of high. This designation will ensure that Staff’s recommended remedy plan will operate as it was intended.

Accordingly, Staff recommends that the Proposed Orders Commission Analysis and Conclusion section on pages 41- 42 be modified so that all performance measures are given a high importance. Therefore, Staff proposes that the last two paragraphs for the Orders Commission Analysis and Conclusion section be deleted and replaced as follows:

~~The CLECs have taken the stance that all measurements should have the same classification and have refused to discuss how they would weight measures. Ms. Moore testified at the August 31, 2001 hearing that the "CLECs choose specifically not to address the high, medium and low nature of the performance measures because we knew we would continue to object to the designation in general and that should the Commission order high, medium and low designations, we reserve the right to go back and negotiate definitions for these particular performance measures." (Tr. at 352).~~

~~We are not convinced that all performance measures are of the same importance. Indeed, we find it unlikely, as the CLECs and Staff were able to identify which measures were important enough to warrant a floor. Therefore, we order that initially the current ranking of performance measures shall remain in place. However, CLECs and Ameritech are directed to meet in collaboratives sessions, specifically to discuss which category specific measures should fall under. The participant proposing the change from the current category will have the burden of proving that such change should be implemented. We also note that Staff and CLECs have indicated that a measure's importance may change over time. (Staff Initial Brief at 33). Therefore, we find that changes to the weightings may also be proposed, as needed, at the six month reviews.~~

All performance measures should be given the same weight -- high importance. The structure of Staff's proposed remedy plan based the high importance designation of performance measures, and tripling of tier 1 and tier 2 payments on the likelihood Ameritech would make payments in excess of 36% of net revenue. Once Ameritech makes remedy payments in excess of 36% of its net return, it is experiencing serious service quality problems that require Commission investigation. *See* Section XIII.D. Staff witness Dr. Patrick stated that this would only occur if Ameritech was providing egregious service. Staff RB at 28. If the Commission were to reduce the weight of performance measures to something less than high, and lowered the tier 1 payments to less than triple the current rate, then the significance of the 36% mark would be diminished.

Staff envisioned that the 36% mark would sound the bell, and indicate that the system is not working. *See* Section XIII.D. Lowering these requirements reduces the overall effectiveness of the plans role - to act as a warning to the Commission that there is something drastically wrong with the current Performance Remedy Plan. Allowing performance measures to be weighted less than "high", would effectively require Ameritech to provide an even worse level of service than what was originally intended by Staff when crafting this plan, before an investigation would commence. Furthermore, this would have a greater adverse affect on competition than what was initially envisioned of the plan when Staff

> proposed 36% acts as a trigger for an investigation. Therefore, for the remedy plan payments structure to work as it was intended, all performance measures will be given a "high" priority, or designation.

EXCEPTION 8 **Section XVII: Ameritech Needs to Update its Interconnection Agreements and Tariff**

Staff recommends that language be added to this section to note that Ameritech's tariff needs to be updated to reflect the changes to the business rules as ordered in this docket. This will ensure that this remedy plan is offered to carriers through interconnection agreements or tariffs during the time that this remedy plan is to remain in effect.

During the hearing the ALJ's asked Dr. Patrick whether Ameritech's tariffs would need to be updated in response to what is ordered in this docket. Tr. 331. Dr. Patrick deferred to Mr. McClerren, however she thought that the tariff should be updated as such. The question was never subsequently asked of Mr. McClerren.

Ameritech witness Mr. Fioretti, however, explained how CLECs gain access to the remedy plan. At the hearing Mr Fioretti stated that

> the way that the Ameritech Remedy Plan is structured, first of all, is that it is tariffed so the customers that are purchasing through the tariff avail themselves of the remedy plan. The second way is if you have an interconnection agreement, you will sign an interconnection agreement amendment to basically invalidate any performance measures and/or remedies that are in your current contract and assume these.
>
> Tr. 368.

Accordingly, Staff recommends that language be added to Section XVI specifically stating how the Remedy Plan is to be made available to CLECs.

Staff proposes the following language be added to the Proposed Order as the last paragraph in Section XVI Commission Analysis and Conclusion:

> <u>Currently, Ameritech's tariff and interconnection agreements incorporate the current remedy plan. The Performance Remedy Plan approved in this docket shall replace the current remedy plan in the tariff, and shall be incorporated into all currently effective interconnection agreements through an interconnection agreement amendment, since this is the first remedy plan approved by the Commission, that accounts for the market in Illinois, pursuant to Condition 30 of the *Merger Order.*</u>

EXCEPTION 9 Clerical Errors

a. There is an extra "to" in Section V.D., third paragraph, second sentence. Removing the "to" results in the following sentence – "Both parties should pay for such an audit."

b. In Section VIII.D, the fifth paragraph, first sentence, the clause after the word "different" needs to be clarified. Staff recommends that the wording after "different" be stricken, and replaced with the following: "approaches to deriving the critical value."

III. CONCLUSION

For the foregoing reasons, we request the Commission accept Staff's recommendations in their entirety as set forth herein.

Respectfully submitted,

____

Sean R. Brady
Nora A. Naughton
Counsel for the Staff of the
Illinois Commerce Commission

Dated: April 11, 2002

Illinois Commerce Commission
Office of General Counsel
160 N. LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877